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SEVENTH REPORT ON STATE RESPONSIBILITY

by

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FOREWORD

1. The present report consists of two chapters. Chapter I deals with the legal consequences of the internationally wrongful acts characterized as international "crimes" of States in article 19 of Part One of the draft articles, as adopted on first reading. It also contains in an addendum to this document the proposed draft articles relating to the said consequences. Chapter II addresses a few outstanding issues relating to the draft articles on the regime of countermeasures and contains an additional draft article of Part Three relating to disputes following on countermeasures against crimes. 1/

1/ Chapter II will form the subject of one or more addenda to the present document.

CHAPTER I

THE LEGAL CONSEQUENCES OF INTERNATIONALLY WRONGFUL ACTS CHARACTERIZED AS "CRIMES" IN ARTICLE 19 OF PART ONE OF THE DRAFT AS ADOPTED ON FIRST READING

A. Introduction

2. The debate carried out last year on the basis of the fifth 2/ and sixth 3/ reports, particularly on the basis of addenda 2 and 3 to the fifth report and addendum 2 to the sixth report, indicates that in dealing with the legal consequences of the so-called international "crimes" of States, the Commission is facing - apart from questions of terminology, degree or emphasis - two interrelated problems or sets of problems. One of them is the identification - de lege lata or de lege ferenda - of the "special" or "supplementary" consequences of the internationally wrongful acts in question as compared to the internationally wrongful acts generally known as international "delicts". This could be defined as the merely normative aspect of the consequences of international crimes of States. The other problem or set of problems is the identification of the entity or entities which is or should be called upon, in a measure to be decided, to determine and/or implement the said special or supplementary consequences. One could call this the institutional aspect.

3. With regard to the normative aspect, the debate has amply shown that the members of the Commission favouring the retention of the distinction set forth in article 19 of Part One accept the obvious and inevitable implication of that distinction. The implication is that, for the said distinction to have any sense or purpose, some special or supplementary consequences are or should be attached to international crimes as opposed to international delicts.

4. As for the institutional aspect, the debate has shown with equal clarity that the members favouring the retention of the distinction of article 19 believe that the implementation of any special or supplementary consequences requires or should be made to require some form or forms of intervention by one or more international bodies in order to reduce, if not exclude altogether, the arbitrariness that might otherwise characterize the implementation of the said consequences by individual States or groups of States operating without any form of control.

5. Less articulately but no less surely, two further major points emerged from the 1994 debate. One point was the close interrelationship between what we call the merely normative aspect and the institutional aspect. The extent to which special or supplementary consequences of crimes - namely aggravations of the consequences of "delicts" - can be credible de lege lata or acceptable de lege ferenda depends largely on the extent to which adequate instruments or devices can be envisaged, de lege lata or de lege ferenda, for their proper and above all not arbitrary implementation. A minimum condition for any

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2/ A/CN.4/453, Add.1 and Corr.1 to 3 and Add.2 and 3.

3/ A/CN.4/461 and Add.1, Add.2 and Corr.1 and Add.3.

significant aggravation would be, in our opinion, some form of objective, juridically dependable determination as to the existence of a crime and its attribution to a State. Although only a few members made specific suggestions with regard to the precise nature of the instrumentalities to be relied upon for such a determination, last year's debate showed that most members favouring the retention of article 19 - whatever their reservations on various aspects of the matter - considered that an objective determination as to the existence and attribution of a crime should be a prerequisite to the implementation of any special regime. This was recognized also by members who opposed the retention of the distinction.

6. Another point we find implicit in the views of most members favouring the retention of article 19 is that the special regime to be proposed for crimes could hardly be envisaged as a matter of strict codification. Although the existence of particularly serious internationally wrongful acts sanctioned by aggravated consequences has rightly been considered by the Commission as a part of international law in 1976 (when art. 19 was adopted), it seems clear that the precise identification and formulation of the special consequences of such wrongful acts and the determination of an implementation regime for such consequences are bound to impose upon the Commission an effort of progressive development more pronounced than in any other area of State responsibility.

7. Because of the close interrelationship between the identification of the special or supplementary consequences and the devising of an implementation regime, one may well wonder whether it would not be better to deal with the institutional problem before dealing with the purely normative one. Two reasons, however, lead us to prefer the reverse order. First of all, it is better to determine what is ultimately to be implemented before thinking of ways and means of implementation. Secondly, while both areas surely involve important issues of progressive development, the determination of the special or supplementary consequences seems to involve a greater number of de lege lata aspects. By dealing first with the latter area one can at least start the exploration from terra cognita or less incognita.

8. Section B of the present chapter is thus devoted to the identification of the special or supplementary legal consequences of international crimes and to the formulation of the provisions that should be added to the articles of Part Two relating to the legal consequences of international delicts. Section C deals with the institutional aspect. Section D contains concluding remarks.

B. The special or supplementary consequences of international crimes of States

1. General

9. The distinction set forth in article 19 of Part One between two kinds of internationally wrongful acts is based upon the higher degree of gravity of international crimes as compared to international delicts. It follows as a matter of course that this difference should be reflected in the consequences attached (de lege lata) or to be attached (de lege ferenda) to the internationally wrongful acts categorized as crimes. The starting point obviously lies in the articles of Part Two considered so far.

10. The relevant articles of Part Two, namely articles 6 to 10 bis and 11 to 14, are formulated in such terms as to cover the consequences of virtually any internationally wrongful act regardless of its categorization under article 19. This applies both to articles 6 to 10 bis on substantive consequences and articles 11 to 14 on instrumental consequences. None of these articles refers in fact to one or the other of the two categories of breaches established in article 19. The underlying idea, however, is a different one. Having accepted, as a matter of method, the Special Rapporteur's suggestion that the problem of the special or supplementary consequences of crimes should better be approached at the last stage of the elaboration of Part Two of the draft (this in view of the particular complexity of the subject), the Commission has covered essentially, in articles 6 to 14, the consequences of delicts. It has kept in abeyance, so to speak, the special or supplementary consequences of crimes.

11. It follows that, although formulated in broad terms encompassing prima facie the consequences of any internationally wrongful act, articles 6 to 14 cover exhaustively, in principle, the consequences of delicts but not the consequences of crimes. More specifically, the Commission has left open, in elaborating those articles, two issues:

(a) one issue is whether and to what extent any of the consequences of internationally wrongful acts contemplated in articles 6 to 14 extends to crimes and, in the affirmative, whether any such consequence should be modified, either by way of strengthening the position of the injured States or by way of aggravating the position of the wrongdoing State;

(b) the other issue is whether any further consequences are or should be attached to crimes over and above those contemplated in articles 6 to 14.

The following paragraphs deal with each of those two issues, first with regard to the substantive consequences and then with regard to the instrumental consequences. In both cases, the best method is to proceed in the order followed in articles 6 to 14.

2. Substantive consequences

(i) General

12. The general substantive consequence is reparation in the broadest sense, extending to cessation and inclusive of restitution in kind, compensation, satisfaction and guarantees of non repetition. Considering that an obligation to provide reparation in a broad sense is in principle a consequence of any internationally wrongful act regardless of its degree of gravity, it could hardly be doubted that such an obligation is also incumbent upon any State which has committed a crime. Any such State would therefore be subject to the general duty of cessation/reparation set forth in articles 6 and 6 bis of Part Two as adopted on first reading.

13. Considering further that, in the case of crimes, all States are "injured States" under the definition formulated in article 5 as adopted on first

reading, 4/ any State should be entitled to obtain cessation/reparation (in the above broad sense) from the State which has committed or is committing a crime.

14. The active and the passive aspects of the responsibility relationship could therefore be covered in an article 15 of Part Two which would be the introductory provision of the special regime governing the substantive consequences of international crimes of States.

15. The special regime in question is introduced (together with that on instrumental consequences) by a chapeau provision, namely article 15 as it appears in addendum 1 to the present document.

16. The provision extending to the case of crimes the general obligations of cessation and reparation set forth in article 6 appears in paragraph 1 of article 16 as contained in addendum 1 to the present document. It will be followed by provisions adapting to crimes the provisions on cessation and reparation contained in articles 6 bis to 10 bis.

(ii) Cessation

17. Nothing needs to be modified about cessation (art. 6) obviously applicable indifferently to crimes and delicts.

(iii) Restitution in kind

18. As contemplated in article 7, the obligation to provide restitution in kind is subject to a number of mitigations set forth in subparagraphs (a) to (d). Of these mitigations, the first (material impossibility) and the second (breach of an obligation arising from a peremptory norm of international law) seem to us to be no less appropriate in the case of crimes than in the case of delicts. The same does not seem to hold true, however, for the exceptions contemplated in subparagraphs (c) and (d) of article 7.

19. The exception of subparagraph (c), according to which the injured State would not be entitled to claim restitution in kind where that would involve "a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation", should not apply in the case of a crime. Considering the erga omnes relationship deriving from such a serious internationally wrongful act, most injured States (in the sense of para. 3 of art. 5 of Part Two, as adopted on first reading) would probably not derive any individual substantive benefit from compliance, by the wrongdoing State, with its specific obligation to provide restitution in kind. There would thus be little or no sense in establishing a comparative relationship between the situation of the wrongdoer, on one side, and that of one or a few injured States, on the other side. The prevailing consideration should be that the wrongdoing State must restore to the fullest possible extent a state of affairs the maintenance of which is of essential interest - in conformity with the notion set forth in article 19 - to the international

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4/ Notably in para. 3 of that article.

community - and this even if a heavy burden is thus placed on the State which has jeopardized that state of affairs by infringing fundamental rules of international law.

20. A similar doubt arises, although to a more limited extent, with regard to that further mitigation of the obligation to provide restitution in kind which is set forth in subparagraph (d) of article 7. We refer to the safeguard of the wrongdoing State's "political independence and economic stability".

21. The preservation of economic stability, despite its great importance for the people as well as the State concerned, does not seem to present, when assessed against the sacrifice of the injured States' interest to obtain restitution, quite the same degree of essentiality. With all due consideration for economic sovereignty and economic self-determination, it is questionable whether the States injured by a serious infringement of a rule safeguarding an essential interest of the international community should be deprived totally or in part of restitution in kind because such a remedy might jeopardize the stability of the wrongdoing State's economy. Such a contingency would not justify relieving the wrongdoing State of the elementary obligation to restore, to the extent materially feasible, the situation pre-existing the breach. However, the waiver of the mitigation should be tempered by a proviso safeguarding the vital needs of the wrongdoing State's population.

22. Notwithstanding its apparent severity, the suggested waiver of the economic stability safeguard would be particularly appropriate in a situation where the wrongdoing State had enhanced its economic prosperity by the very crime it had committed. An example could be the case of a State having drawn a major economic advantage, in the area of trade relations with other States, from a policy of exploitation or slave labour to the detriment of an ethnically, ideologically, religiously or socially differentiated part of its population in massive breach of obligations relating to fundamental human rights. Another example could be that of a colonial power enhancing its economic prosperity by pursuing a policy of ruthless exploitation of the resources and the population of a dependent territory. The wrongdoing State could not in such cases be relieved of the obligation to provide restitution in kind, namely to restore the original situation of the unlawfully exploited population or territory by invoking that compliance with this obligation would have - as it might well have - a substantial negative impact on its economic stability.

23. Some consideration should also be given, as regards the mitigating factor contained in subparagraph (d) of article 7, to the possibility of distinguishing, within the general concept of "political independence", political independence and political regime. Surely, one thing is the independence of a State, namely its existence as a distinct sovereign entity alongside with its peers and as a distinct person of international law - and the preservation of that status, another thing is the so-called "freedom of organization" which every sovereign State is entitled to enjoy in the choice of its form of government and in the appointment of its leaders. The two concepts are of course closely interrelated, "freedom of organization" being precisely among the principal manifestations and consequences of the existence

of an entity as an independent, sovereign State. There may well be a difference, however, from the viewpoint of the mitigating factor under discussion.

24. If one may admit that political independence in the first sense - namely in the sense of independent statehood - would have to be preserved - together, we assume, with territorial integrity - even at the price of relieving a "criminal" State from the obligation to provide restitution in kind, the same may not be true for the "freedom of organization" - namely for the regime - of such a State. Especially in the case of aggression (a wrongful act frequently perpetrated by dictators or otherwise despotic governments), it is far from sure, in our view, that the obligation to provide full restitution in kind could be mitigated simply because compliance with it could jeopardize the continued existence of a condemnable regime. It should not be overlooked that the preservation of a regime responsible for serious breaches of essential international obligations such as those relating to self-determination, decolonization or human rights may constitute by itself an internationally wrongful act of a very serious nature. Although they cannot be considered as real precedents of individual claims of States for international crimes, illustrations of demands of restitution in kind in cases connoting the type of crimes under subparagraph (b) of paragraph 3 of article 19 of Part One can be found in the practice of the United Nations bodies. 5/

25. Whether or not the limitation related to the survival of a political regime falls within the ambit of the mitigating factor set forth in subparagraph (d) of article 7, it should be excluded in the case of any one

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5/ Examples are the demands of restitution in kind addressed by the Security Council to States whose behaviour connotes grosso modo categories of crimes contemplated in para. 3 of article 19. Examples of demands of restitutio that might affect "economic stability" are provided by the Security Council resolutions relating to the colonial policies of Portugal and requiring that State to proceed to "the immediate recognition of the right of the peoples of the Territories under its administration to self-determination and independence". See also, for more detailed requests, paras. 5 (a), (d) and (e) of resolution 180 (1963) and resolutions 312 (1972) and 322 (1972).

With regard to the "excessive onerousness" (as provided under subpara. (c) of art. 7), one may recall the demands addressed to South Africa for the adoption of urgent and effective measures to put an end to the political system of racial discrimination (see especially resolutions 181 (1963), 392 (1976), 417 (1977), 473 (1980), 554 (1984), and 556 (1984)). Similarly, in the case of Southern Rhodesia, the Security Council has not only declared the total constitutional illegitimacy of the Declaration of independence and other legislative enactments of the Ian Smith's regime; it has also stated quite explicitly that the end of that regime was the "first prerequisite" for the re-establishment of legality in the territory of Southern Rhodesia (see, especially, resolutions 423 (1978), 445 (1979) and 448 (1979)).

On the question of the "onerousness" of demands addressed to South Africa, see also our fifth report (A/CN.4/453/Add.3), p. 5, para. 72.

of the four kinds of crimes contemplated in paragraph 3 of article 19 of Part One.

26. The above considerations lead us to conclude that the mitigation of the obligation to provide restitution in kind contained in subparagraph (d) of article 7 should not be applicable in the case of a crime, except where full compliance with that obligation would put in jeopardy:

(a) the existence of the wrongdoing State as a sovereign and independent member of the international community or - we assume - its territorial integrity; or

(b) the vital needs of its population in a broad sense, namely, the essential requirements, of a physical or moral nature, of the survival of the population.

27. The provision on restitution in kind as adapted to crimes is set forth in paragraph 2 of article 16 appearing in addendum 1 to the present document.

(iv) Compensation

28. No adaptation seems to be necessary with regard to compensation as contemplated in article 8. Based as it is upon the concept of reparation by equivalent of any economically assessable injury or damage (inclusive of moral damage to private parties), it applies in full in the case of crimes as it does in the case of delicts.

(v) Satisfaction and guarantees of non-repetition

29. Another rule on reparation to be reviewed in connection with crimes is paragraph 3 of article 10 relating to that special form of reparation which is satisfaction, a remedy closely interrelated and frequently confused with the guarantees of non repetition contemplated in article 10 bis. 6/

30. Paragraph 3 of article 10 rules out any demands that "would impair the dignity" of the wrongdoing State. The idea is to exclude demands compliance with which would affect, rather than just the dignity, the existence and the sovereignty of the wrongdoing State, namely, its independence, its liberty or its form of government. Although it is expressed only with regard to satisfaction in a narrow sense, this restriction is presumably applicable also to the closely related area of the so-called guarantees of non repetition. In both areas a differentiation between international crimes of States and delicts seems to be called for.

31. Whether one understands dignity in a narrow or a broad sense, we would consider it inappropriate to extend the benefit of that safeguard to a State which is the author of a crime of the kind contemplated in paragraph 3 of article 19. It would be absurd to allow such a State to rely on dignity in

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6/ It is indeed difficult to distinguish, among the forms of satisfaction, those that are called for only as a matter of thoroughness of reparation and those which may operate as guarantees of non repetition.

the narrow sense and invoke an image or majesty it has itself offended by wilful wrongful conduct. But it would be equally absurd to allow a State which has committed or is committing an international crime to evade particular demands of satisfaction or guarantees of non repetition by invokin such broad concepts as sovereignty, independence or liberty. As in the case of demands of restitution in kind, the only restrictions which such demands could reasonably be subjected to are those which could be indispensable for the safeguard

(a) of the continued existence of the wrongdoing State as a sovereign and independent member of the international community and - we assume - its territorial integrity; and

(b) of the vital needs of the wrongdoing State's population, the concept of vital needs being taken in a broad sense, encompassing the population's essential requirements of a physical or moral nature.

32. Unless areas such as these were affected, the State which committed or i committing a crime should not be permitted to evade, by invoking its sovereignty or independence, not only demands of disarmament, demilitarization, dismantling of war industry, destruction of weapons, acceptance of observation teams, or change to a form of government not incompatible with fundamental freedoms, civil and political rights and self-determination as may be addressed to it following a crime of aggression, 7/ but also demands that could be justified as forms of

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7/ Significant - whatever the legal merits of the respective decisions - are precedents emerging from Security Council resolutions concerning Iraq following the Gulf War. We recall resolution 687 (1991) imposing upon Iraq a series of obligations relating to the destruction and control of ballistic, chemical and nuclear armaments and the disposal of arms, arms components and structures susceptible of military use. The modalities of implementation of such obligations were specified in subsequent resolutions providing for the competence of special commissions (see for example, resolutions 699 (1991), 707 (1991) and 715 (1991)). The latter resolution approved the plans worked out by the Secretary-General of the United Nations and the Director of IAEA formulating in detail the powers of the Verification Commission and Iraq's related obligations. On the particularly stringent character of such forms of guarantees of non repetition see, inter alios, B. Graefrath and M. Mohr, "The Legal Consequences of an Act of Aggression: The Case of the Iraqi Invasion and Occupation of Kuwait" in Austrian Journal of Public and International Law, 1992, pp. 127-129; T. Mahrun, "The Implementation of Disarmament and Arms Control Obligations Imposed Upon Iraq by the Security Council" in ZaöRV, 1992, pp. 784-786; S. Sucharitkul, "The Process of Peace-Making following Operation Desert Storm" in Austrian Journal of Public and International Law, 1992, pp. 25-28; L.R. Roberts, "United Nations Security Council Resolution 687 and its Aftermath: The Implications for Domestic Authority and the Need for Legitimacy", New York University Journal of International Law and Policy, 1993, pp. 602-607 and 610; and V. Gowlland-Debbas, "Security Council Enforcement Actions and Issues of State Responsibility" in International and Comparative Law Quarterly, 1994, p. 83.

satisfaction or guarantees of non repetition further to the commission of crimes of the kinds contemplated in subparagraphs (b), (c) or (d) of paragraph 3 of article 19. We think of demands of abrogation of discriminatory, racial or segregational legislation, popular consultations such as free elections or plebiscites, restoration of fundamental rights and freedoms, 8/ dismantling of environmentally dangerous plants and compliance with the aut dedere aut iudicare principle with regard to individuals accused of delicta iuris gentium. 9/ Demands such as these would affect neither the

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A further particularly stringent guarantee provided for in resolution 687 (1991) is the Security Council's demand that Iraq respect the Kuwaiti border as determined by a previous territorial delimitation treaty between the two States and the Security Council's decision to guarantee the inviolability of the said border through the establishment of a demilitarized zone which penetrates Iraqi's territory for 10 miles and Kuwaiti territory for 5 miles, the said area to be subject to surveillance and continued presence of observers. See also the subsequent resolutions 773 (1992), 833 (1993) and 949 (1994), where it is recalled, in particular, that Iraq "must unequivocally commit itself by full and formal constitutional procedures to respect Kuwait's sovereignty, territorial integrity and borders".

8/ An example is offered by the demands addressed by the Security Council to South Africa to repeal or revise its apartheid legislation (footnote 5, supra).

9/ Leaving aside their legal merits, which we do not need nor intend to address in the present report, we may recall, as examples of theoretically conceivable measures, the demands addressed by the Security Council to the Libyan Arab Jamahiriya by resolutions 731 (1992) and 748 (1992). Essentially the Libyan Arab Jamahiriya, accused of international terrorism, was required to deliver for trial the persons allegedly responsible for the Lockerbie bombing, practically a "forced" extradition which exceeded the forms of satisfaction that the country concerned would have been under an obligation to provide under article 10 of Part Two of our draft. Rightly or wrongly, such a demand would "impair the dignity of the State" to which it was addressed. We need hardly recall that very different views have been expressed by commentators on the Lockerbie case: see B. Graefrath, "Leave to the Court What Belongs to the Court. The Libyan Case" in European Journal of International Law, 1993, esp. pp. 184 ff.; M. Weller, "The Lockerbie Case: A Premature End to the New World Order?" in African Journal of International and Comparative Law, 1992, pp. 302 ff.; C. Tomuschat, "The Lockerbie Case Before the International Court" in The Review of the International Commission of Jurists, 1992, pp. 38 ff.; F. Beveridge, "The Lockerbie Affair" in International and Comparative Law Quarterly, 1992, pp. 907 ff.; M. Arcari, "Le risoluzioni 731 e 748 e i poteri del Consiglio di Sicurezza in materia di mantenimento della pace" in Rivista di diritto internazionale, 1992, pp. 932 ff.; M.P. Andrés Saénz de Santa María, "De maximis non curat praetor ...? El Consejo de Seguridad y el TIJ en el asunto Lockerbie" in Revista Española de Derecho Internacional, 1992, pp. 327 ff.; E. Orihuela Calatayud, "La actuación del Consejo de Seguridad de la ONU en el asunto Lockerbie: paradigma de 'incontrolable' abuso de poder", ibidem, pp. 395 ff.

wrongdoing State's existence - and in that sense its "political independence" - nor the vital needs of its population. This applies particularly to the obligation of the wrongdoing State not to refuse demands of fact-finding, including in its territory, in order to permit control of full compliance with its obligations of cessation/reparation and guarantees of non repetition. 10/

33. The relevant provision is to be found in paragraph 3 of article 16 as it appears in addendum 1 to this document.

3. Instrumental consequences

(i) General

34. Whatever specific features the regime of countermeasures against crimes may have to assume as compared to the regime envisaged in articles 11 to 14, it will present two characteristics.

35. Firstly, the option to resort to countermeasures, reserved, in the case of most delicts, to one or more States, extends in the case of crimes - as does the right to claim compliance with the special or supplementary substantive consequences - to all States. This seems to be an inevitable consequence of the fact that, while only some kinds of delicts involve violations of erga omnes obligations, all crimes consist of infringements of erga omnes obligations. 11/ This is recognized by paragraph 3 of article 5 of Part Two of the draft as adopted on first reading, whereby, in the case of

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Other examples borrowed from the practice of the Security Council are resolutions 808 (1993) and 827 (1993) by which the Council established an International Criminal Tribunal for the trial of persons allegedly responsible of grave violations of humanitarian law in the territory of the former Yugoslavia. In particular, the obligation of the possibly responsible State or States to deliver such persons would represent (leaving aside here again the legal merits of the whole matter) a "supplementary" consequence of considerable impact upon the sovereignty-independence of the target State or States (especially in view of the combination of the State and individual liability). See, inter alios, B. Graefrath and M. Mohr, "Legal Consequences of an Act of Aggression", op. cit., p. 130.

10/ Compare with (b) of para. 31.

11/ On the relationship between "erga omnes" obligations and international crimes see V. Starace, "La responsabilité résultant de la violation des obligations à l'égard de la communauté internationale" in Hague Recueil, 153, 1976, V, esp. pp. 289 ff.; F. Lattanzi, "Sanzioni Internazionali" in Enciclopedia del Diritto, vol. XLI (1989), pp. 554-555; A.J.J. de Hoogh, "The Relationship between Jus Cogens, Obligations Erga Omnes and International Crimes: Peremptory Norms in Perspective" in Austrian Journal of Public and International Law, 1991, pp. 183 ff.; C. Annaker, "The Legal Régime of Erga Omnes Obligations in International Law", Austrian Journal of Public and International Law, 1994, pp. 131 ff.

a crime, all States are injured States. It follows that, subject to any qualifications that the Commission may deem appropriate to introduce in extending the said option to all States, a State committing a crime is in principle considerably more exposed to countermeasures than a State committing a breach. There is thus an increase in the virtual or actual pressure exercised by the law upon any potential or actual "criminal" States.

36. There is, secondly, an increased pressure deriving from the aggravation of the substantive consequences provided for in subparagraphs (c) and (d) of article 7 (on restitution in kind) and paragraph 3 of article 10 (on satisfaction) as previously adopted. The onerousness of the consequences to be faced by the State which has committed a crime is particularly evident with regard to guarantees of non repetition. If, as noted, the omnes injured States are entitled to address to the wrongdoing State demands of disarmament, demilitarization, dismantling of war industry, destruction of weapons, acceptance of observation teams, adoption of laws affording adequate protection for minorities and establishment of a form of government not incompatible with fundamental freedoms, civil and political rights and self-determination, the weight of the countermeasures intended to compel the latter State, in case of refusal, to comply with such demands will be greater than that of measures following upon a delict. The aggravation of the wrongdoing State's substantive obligations results in an increased likelihood of non-compliance, by the State concerned, with the "secondary" obligations deriving from the crime. It is the weight of the two factors and their interaction which differentiates the regime of the consequences of crimes from that of the consequences of delicts and justifies treating the former as a special category of wrongful acts. 12/ A further, highly important element of aggravation is of course represented by the solemn condemnation which the crime and its author would elicit on the part of the international bodies which would be entrusted under the regime proposed in paragraphs 100 and ff.

12/ The close relationship between the substantive and instrumental consequences of crimes (close to the point of abolishing a distinction already tenuous in some forms of ordinary satisfaction) manifests itself in some features of the regime imposed upon Iraq by United Nations resolutions following the Gulf War. Without entering into the merits of the individual measures (on which he reserves here his opinion), the Special Rapporteur refers in particular to the creation by the Security Council, under resolution 687 (1991), of a compensation fund financed by Iraqi oil exports and the further specifications deriving from resolutions 705 (1991), 706 (1991) and 778 (1992). Although it cannot be categorized as a countermeasure in a narrow sense, the Compensation Commission arrangement secures - whatever its legal merits - the institutionalized implementation of the substantive consequences of a crime of aggression. The substantive and instrumental consequences are both aggravated by the circumstance that the arrangement subjects the economy of Iraq to a particularly stringent international control. Also on these aspects, see B. Graefrath and M. Mohr, "Legal Consequences of an Act of Aggression ...", op. cit., p. 121; V. Gowlland-Debbas, "Security Council Enforcement Action ...", op. cit., p. 82 and P.M. Dupuy, "Après la guerre du Golfe" in Revue générale de droit international public, 1992, p. 636.

with the basic determination as to the existence and attribution of an international crime and, consequently, on the part of the international community at large.

37. Like the rules concerning the substantive consequences, the provisions relating to the instrumental consequences of crimes could usefully be preceded by a general opening provision echoing the general provision concerning delicts contained in article 11 of Part Two. This opening provision should set forth the general principle that any State injured by an international crime of a State whose demands are not met with an adequate response on the part of that State is entitled to resort to countermeasures under the conditions and subject to the limitations specified in subsequent provisions - which provisions would adapt to the case of crimes, where necessary, the provisions of articles 11 to 14.

38. Considering that article 11 has only been tentatively adopted, the Special Rapporteur hopes that its formulation could be reviewed, taking into account the specificity of crimes, in two respects, namely

(a) the "response" from the wrongdoing State; and

(b) the function of countermeasures.

39. The provision on crimes corresponding to article 11 appears in addendum 1 as paragraph 1 of article 17.

(ii) Dispute settlement and prior communication

40. The first problem will be to determine whether and possibly to what extent the conditions of lawful resort to countermeasures spelled out in article 12 should apply also in the case of a crime. We refer to summation or notification and, more particularly, to prior resort to available means of dispute settlement.

41. To begin with the requirement of prior resort to available means of dispute settlement, an adjustment seems to be indispensable. As indicated in paragraphs 4 and 5 supra and in paragraphs 85 to 109 infra, the taking of countermeasures against a State which has committed or is committing a crime should be preceded by some form of pronouncement by one or more international organs as to, at least, the existence of a crime and its attribution. Such a pronouncement, whatever its nature and whatever the nature of the international body, should suffice for any injured States to be entitled severally or collectively to resort to countermeasures, regardless of whether dispute settlement means are available or used. The basic condition set forth in article 11 - namely the absence of an "adequate response", particularly the failure of the wrongdoing State to desist from the unlawful conduct - should suffice for the injured States to be entitled to react.

42. It will be recalled that paragraph 2 (a) of article 12 leaves open the possibility for the injured State to resort to "urgent, temporary measures as are required to protect the rights of the injured State or limit the damage caused by the internationally wrongful act" even before resorting to the available dispute settlement procedures. This issue does not arise in the present context, bearing in mind that the condition of prior resort to dispute

settlement procedures would not apply in the case of a crime. A problem does arise, however, with regard to the requirement of a prior pronouncement by an international body, referred to in paragraphs 4 and 5 supra and in paragraphs 85 to 109 infra and in the relevant article, as a prerequisite for lawful reaction on the part of any one of the omnes States injured by a crime it seems reasonable to say that although, prior to such pronouncement, the omnes States injured by a crime are not entitled to resort to full countermeasures, they are none the less entitled to resort to such urgent interim measures as are required to protect their rights or limit the damage caused by the crime. We refer to measures aimed at securing immediate access to the victims for purposes of rescue and/or aid or preventing the continuation of a genocide, measures concerning humanitarian convoys, anti-pollution action, passage facilities, etc.

43. The corresponding provision is to be found in paragraph 2 of article 17 as it appears in addendum 1 to this document.

44. However, the option to resort to countermeasures should obviously be closed altogether in case of submission of the matter by the alleged wrongdoing State to the binding third party adjudication procedure to be envisaged in Part Three. 13/ By analogy with the provisions of Part Three as proposed in 1992 for the settlement of post-countermeasures disputes relating to delicts, the competent third party would be empowered to indicate interim measures with binding effect. The option to resort to countermeasures would revive in case of failure of the wrongdoing State to comply with a third party indication of interim measures or with its obligation to pursue the adjudication procedure in good faith.

45. As for the article 12 requirement of timely communication, it does not seem that it should apply in the case of a crime, except perhaps in relation to particularly severe measures which might have adverse consequences for the wrongdoing State's population. A State which has committed or is committing a wrongful act of the degree of gravity of the crimes singled out in article 19, presumably involving a measure of wilful intent, should not be entitled to a warning that might reduce the effectiveness of the countermeasures. Considering anyway that as noted in paragraphs 36 supra and proposed in 100 and ff. infra, any special form of reaction to a crime on the part of individual States or groups of States would be preceded by open debates within one or more international bodies, it is unlikely that a wrongdoing State might be unaware of the possibility that injured States could resort to countermeasures.

(iii) Proportionality

46. Although we bear at least one half of the responsibility for the 1993 formulation of article 13, we have come to entertain serious doubts, after reconsidering that provision in connection with the instrumental consequences

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13/ As noted in the fifth report (A/CN.4/453 and Add.1), the draft articles of Part Three proposed by this Special Rapporteur left deliberately untouched the problem of post-countermeasures dispute settlement in the case of crimes. The proposed provision shall be found in Chapter II of the present report. See however para. 108 infra.

of crimes, as to the appropriateness of the said formulation. We refer to the clause according to which proportionality should be measured in relation to "the gravity of the internationally wrongful act and the effects thereof on the injured State". Prompted initially by the difficulty of applying such a criterion to countermeasures against the author of a State crime, our doubts now extend, to an almost equal degree, to the implications of the clause in question in relation to delicts. We recommend therefore that the Commission give more thought to the matter on the basis of the following considerations.

47. The degree of gravity of an internationally wrongful act should be determined by reference to a number of factors, including the objective importance and subjective scope of the breached rule, the dimension of the infringement, the subjective element, inclusive of the degree of involvement of the wrongdoing State's organizational structure and of the degree of fault (ranging from culpa levis or levissima to negligence, gross negligence and wilful intent) and, ultimately, the effects of the breach upon both the injured State and the "object of the protection" afforded by the infringed rule. 14/

48. We are of course aware that our distinguished colleagues have so far rejected our suggestion that, even for delicts, the subjective element should be taken into more explicit consideration, in determining the degree of gravity and the consequences, than is done in paragraph 2 (c) of article 10. 15/

14/ To illustrate the effects upon the "object of protection" (or "protected object"), one may refer to the damage, injury or harm suffered by individuals as a consequence of the violation of human rights obligations. Another example is the damage to the common parts of the human environment caused by a violation of obligations relating to the safeguard of the environment.

15/ Among the authors who believe that the element of fault or the wilfulness of the State which has committed a wrongful act is relevant in determining the consequences other than strictly compensatory of the wrongful act (satisfaction, guarantees of non repetition, countermeasures), we recall Ago, "La colpa nell'illecito internazionale" in Scritti giuridici in onore di Santi Romano, vol. III, Padua, 1940, p. 302; Oppenheim, International Law, VII ed., London 1955, vol. I, p. 354; Luzzatto, "Responsabilità e colpa in diritto internazionale" in Rivista di diritto internazionale, 1968, p. 63; Brownlie, System of the Law of Nations, I: State Responsibility, Oxford, 1983, p. 46; and Simma, "Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law" in Österreichische Zeitschrift für öffentliches Recht, 1970, p. 12. On the relationship between the "psychological element" and the crime of State, Rigaux, "Le crime d'Etat. Réflexions sur l'article 19 du projet d'articles sur la responsabilité des Etats" in Etudes en l'honneur de R. Ago, vol. III, Milano, 1987, pp. 320-323; and Dupuy (P.-M.), "Faute de l'Etat et fait internationalement illicite" in Droits, 1987, pp. 62-63.

Our position was expressed in our second report (Yearbook of the International Law Commission, 1989, Vol. II, Part One, doc. A/CN.4/425 and Add.1, paras. 162-188) and in draft article 10 as proposed therein (ibid.

49. Be it as it may of that attitude with regard to delicts, we presume that a different opinion might well prevail - as we believe it should - with regard to the relevance of the subjective element of crimes. There is hardly any question that wilful intent (dolus as the gravest degree of fault) is an essential, sine qua non feature of a crime. It is a point which we have occasionally referred to in our reports. 16/ Should we not, then, consider this element more explicitly than was done in 1992 in the cited provision of article 10? Can we, when dealing with proportionality, ignore this element? What about the objective importance and subjective scope of the infringed rule? Is it appropriate, anyway, to refer explicitly to the "effects" - and the effects upon the injured State (or States) - while mentioning neither the importance of the rule, nor culpa or dolus, nor the effects upon the "protected object" (human beings, peoples, the environment)? Are we sure that by expressly mentioning specific factors for the assessment of gravity (such as the effects of the wrongful act upon given subjects - as opposed to objects) while remaining silent on other factors, one does not convey a misleading message that may affect the proper evaluation of the degree of gravity by stressing certain factors to the detriment of others?

50. The problem is compounded by the difference between delicts and crimes. To speak of the "effects of the breach on the injured State" may be relatively appropriate (despite the noted emphasis on one factor to the detriment of others) in the case of most delicts. In the area of delicts, the injured party is likely to be a single State but even there, it will not always be so. In the case of an erga omnes delict, the gravity of the effects may well vary

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para. 191). According to that article, the choice of form or forms of satisfaction shall be made "taking into account the importance of the obligation breached and the existence or degree of wilful intent or negligence". The problem is also dealt with in our "State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance" in Mélanges Michel Virally, Paris, 1991, pp. 25-41. The problem of State fault is treated thoroughly by G. Palmisano, "Colpa dell'organo e colpa dello Stato nella responsabilità internazionale" in Comunicazioni e Studi dell'Istituto di Diritto internazionale e straniero dell'Università di Milano (1992), pp. 625-755. Interesting remarks on the relevance of "wilfulness" in international responsibility can be found in Salmon, "L'intention en matière de responsabilité internationale" in Mélanges Michel Virally, op. cit., pp. 413 ff. The decisive importance of "intent" and "mental state" in the qualification of a wrongful act as a crime is stressed by the United States Government in its observations on article 19 (Genocide) of the draft Code of Crimes against the Peace and Security of Mankind, reproduced in the thirteenth report of the Special Rapporteur, Mr. Doudou Thiam (A/CN.4/466, para. 61).

16/ Second report, loc. cit. paras. 164-190; On the decisive relevance of the subjective element in international crimes of States - particularly of wilful intent - see, in addition to the writings cited in the previous footnote, Palmisano, "Colpa dell'organo e colpa dello Stato" ..., op. cit., at pp. 719 ff. esp. 736-749, and "Les causes d'aggravation de la responsabilité des Etats et la distinction entre 'crimes' et délits internationaux," Revue générale de droit international public, 1994, no. 3, pp. 629-673, esp. 645-647, 661-664 and 666-668.

from one injured State to another. Assuming that this would not be a major difficulty, what about an erga omnes violation of human rights obligations? What effect does such a violation have on each and every State? In terms of physical damage, the effect may be minimal. In terms of injury (to be measured against the importance of the rule and of the infringed human right or freedom), the effect is in principle very significant for omnes States involved; but what about the States' diverse perceptions of the injury? For State whose legal system is highly developed in the area of human rights and public opinion very sensitive to violations by other States, the effect will be very significant. For a State in a different situation, it may be minor o inexistent. Crimes being always erga omnes, the assessment of gravity on suc a subjective basis as that suggested by the article 13 formula may lead to difficulties. Firstly, there may be considerable variations depending on differences in the extent of damage or differences of perception among the omnes injured States. Secondly, there may well be a damage to a "protected object" transcending the degree of injury suffered or perceived by any one of the injured States.

51. Once more we are confronted with maximalistic and minimalistic theoretically conceivable solutions. An ambitious solution would be to attempt an enumeration, as complete as possible, of the multiple relevant factors of gravity. This would lead us too far into a revision of article 1 with little chance of success. Another solution would be to leave article 1 as it stands for delicts and try a different formulation for crimes. Considering, however, that the "effects on the injured State" clause is inappropriate also for delicts and that a drastically different treatment of delicts and crimes in that respect might be misleading for the interpreter, a better solution would be simply to drop that clause for both delicts and crimes. For both, the rule would be article 13 as amended through the elimination of the words "effects on the injured State".

52. For delicts as well as crimes, the proportionality criterion would thus remain the gravity of the wrongful act alone as a whole. Instead of mentioning some factors of gravity and omitting others, article 13 would refe to the whole range of those factors as reflected in the term "wrongful act" a an all-embracing concept. It will be for the commentary to explain the Commission's choice: a choice that appears to us logically more correct and more adaptable to the multiplicity and variety of the concurring factors of gravity.

53. The concept of the gravity of the effects upon one or more given States the so-called "directly" or "more directly" injured States - would be obviously subsumed under the comprehensive concept of gravity of the violation, encompassing all factors like those tentatively listed in paragraph 47 supra.

54. The relevant provision is to be found in paragraph 3 of article 17 as appearing in addendum 1 to this document.

(iv) Prohibited countermeasures

55. As regards prohibited countermeasures, no significant departure from the text of article 14 (as adopted by the 1993 Drafting Committee) seems to be called for in relation to crimes.

56. One can hardly doubt that the prohibitions contained in article 14, subparagraphs 1 (a) and (b), extend to countermeasures in response to a crime. We refer to the prohibition of countermeasures consisting in the threat or use of force and the prohibition of forms of extreme economic or political coercion.

57. The prohibitions contemplated in the preceding paragraph do not apply, of course, either to the forcible measures decided upon by the Security Council under Chapter VII of the United Nations Charter or to self-defence under Article 51. 17/ Both exceptions are covered by draft article 20, as contained in addendum 1 to the present document.

58. Equally applicable to crimes seem to be the prohibitions contained in the three subsequent subparagraphs of article 14. We refer to the prohibitions which are intended to safeguard the "inviolability of diplomatic or consular

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17/ The exception to the prohibitions set forth in subparagraphs 1 (a) and (b) of article 14 in the case of measures adopted under Chapter VII of the Charter is clearly confirmed by the practice of the Security Council. This applies both to the use of force and to the use of severe economic measures.

(i) With regard to the use of force, one may recall, in addition to the major example of resolution 678 (1990) authorizing the use of force against Iraq, a number of Security Council resolutions providing similar authorizations in order to impose compliance with substantive obligations of the wrongdoing State. Examples are resolutions 686 (1991), 678 (1990), 687 (1991) and 773 (1992). These resolutions, all concerning the aftermath of the Gulf War, reiterate the Security Council's decision to guarantee "with all necessary means" compliance by Iraq with its reparation obligations, the inviolability of the Iraqi-Kuwait border and the maintenance of the demilitarized zone established in the border area. The use of force is also authorized in other resolutions intended to ensure the effectiveness of measures adopted by the Council under Articles 40 (provisional measures) and 41 (economic sanctions) of the Charter. A well-known precedent is resolution 221 (1966) which requested the United Kingdom Government to prevent, "by the use of force if necessary", the arrival at the Mozambique harbour of Beira of oil supplies for Southern Rhodesia. Of a similar purpose are resolutions 787 (1992) and 820 (1993) relating to the enforcement of economic measures against the Federal Republic of Yugoslavia (Serbia and Montenegro). Other authorizations to use force have been issued by the Security Council in order to enforce protective measures of a humanitarian character. Such is the case of resolutions 770 (1992), 781 (1992) and 813 (1993). For a review of the Security Council practice, see H. Freudenschuß, "Between Unilateralism and Collective Security: Authorizations of the Use of Force by UN Security Council" in European Journal of International Law, 1994, pp. 492 ff.

(ii) A departure from subparagraph 2 (b) of article 14 seems to be envisaged with respect to the economic measures available to the Security Council under Article 41, whenever the intensity, scope, and duration of such measures attain the level of "extreme measures of ... economic coercion".

agents, premises, archives and documents" (subpara. c), "basic human rights" (subpara. d) and the obligations deriving from "a peremptory norm of international law" (subpara. e).

59. Although they were originally intended to apply to countermeasures following upon mere delicts, the said prohibitions must extend, in view of the high importance of the "protected objects", to countermeasures in response to crimes. As a result, of course, the kinds of measures that injured States may take against a "criminal" State will be significantly reduced. In the case of crimes as opposed to that of delicts, however, the constraints deriving from the three prohibitions will be counterbalanced by the increase in the number of States - omnes injured States - entitled to resort to those countermeasures which are not covered by the prohibitions. This is not without importance given the multiplicity of actors - not to mention the "hue and cry" effect of a finding of crime by competent international bodies. The best illustration of the range of measures not involving the use of force that may be taken is provided by Article 41 of the Charter which, although pertaining to a context different from that of international responsibility, can offer, mutatis mutandis, useful guidance to any one of the omnes injured States in determining their reaction. According to that provision, non-forcible measures may include "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations". Taken by a number of States which may amount to the totality of the members of the international community, measures such as these (which, it is true, also encompass measures of mere retorsion) would - combined with moral condemnation - constitute a far more effective reaction and deterrent than any similar measures taken by one or a few States injured by a delict. 18/

18/ However, some thought should be given by the Commission to the problem of those countermeasures that may affect the sovereignty-independence (exclusive of territorial sovereignty), the liberty or the domestic jurisdiction of the wrongdoing State. Although such elements are not mentioned in article 14, they may be implied either in the prohibition of military force and extreme forms of political or economic pressure or in the prohibition safeguarding peremptory rules (jus cogens). Assuming - as we assume - that such is the correct solution with regard to delicts, can one say the same thing with regard to crimes? Aren't there, for example, situations or circumstances in which one or more of the omnes injured States could lawfully violate under article 11 (provided they did not infringe the prohibition of force or extreme political or economic measures) the sovereignty-independence or domestic jurisdiction of a State which has committed or is committing a crime? Examples could be the imposition of protected areas, no-fly zones, in loco fact-finding and control and other forms of intrusive action in the criminal State's territory vis-à-vis private parties or government officials, or the arrest or seizure of the criminal State's merchant ships on the high seas et similia. Would it not be showing undue leniency towards an aggressive State to bar the application to that State, by the omnes State injured by the act of aggression, of countermeasures infringing upon the said State's independence or domestic jurisdiction except on the basis of Security Council measures under Chapter VII and, of course, self-defence?

60. In conclusion article 14 as adopted does not call for any adaptation to be applicable to crimes.

4. Other consequences of crimes

61. The special régime of the consequences of crimes should be completed by adding two further sets of provisions. One set of provisions should specify that the State which has committed or is committing a crime shall not be entitled to oppose fact-finding operations and control mission in its territory for the verification of compliance with the obligations of cessation and reparation. A second set of provisions should cover a number of special obligations of omnes injured States, broadening the scope of the proposals made by our predecessor Professor Riphagen in his draft article 14. The object of such obligations would be to ensure of consistency, solidarity or cooperation among States in condemning the crime, censuring the conduct of the law-breaking State and otherwise reacting thereto.

62. The obligations of injured States referred to in the preceding paragraph should be intended to ensure:

(a) that the law-breaking State does not find any support for the maintenance or legitimization of the situation created in its favour by the perpetration of the crime; and

(b) that the actions of other States lawfully seeking to reinstate the infringed right are not hindered.

To that end the Riphagen proposals could be used, subject to some important additions and adjustments.

63. According to Riphagen's draft article 14, the States would be under the obligation:

(a) not to recognize as legal the situation created by the crime;

(b) not to render aid or assistance to the State which has committed such crime in maintaining the situation created by such crime;

(c) to join other States in affording mutual assistance in carrying out the obligations under subparagraphs (a) and (b).

When we speak of "domestic jurisdiction" we have in mind (at least within the present context) not the area in which the wrongdoing State would be free from international obligations but the sphere of interindividual relations within the State, subject to the public and private law of that State and to the exclusive competence or jurisdiction of the State's legislative, administrative and judicial organs. We leave out, for our present purposes, the question whether this is or not the only correct notion of domestic jurisdiction and our views in that regard ("Le domaine réservé, l'organisation internationale et le rapport entre droit international et droit interne", Cours général, Haque Recueil, p. 225 (1990-VI).

64. Subparagraph (a) could usefully and appropriately be reinforced through the addition of a clause specifying that ex delicto ius non oritur should apply to both the national and the international legal effects that may have derived or be deriving from the situation created by the internationally wrongful act. National and international law should both be expressly mentioned. 19/

65. Subparagraph (b) could with advantage be more forcibly worded. 20/

66. Subparagraph (c) is per se satisfactory - notwithstanding possible drafting improvements - as it expresses the duty of all States to assist each other in complying with the obligations set forth in subparagraphs (a) and (b). 21/ It might be useful to provide

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19/ The basic obligation concerned has found expression in the Security Council's practice. Faced with situations possibly belonging in the category of international crimes, the Council called States not to recognize (and to consider null and void) all legal effects deriving therefrom. See for instance resolution 216 (1965), where the Council condemned the unilateral declaration of independence by the regime of Southern Rhodesia and called upon States "not to recognize this illegal racist regime"; resolution 662 (1990), where the Council called upon States not to recognize the legal effects of the Iraqi declaration of annexation of Kuwait; and resolution 554 (1984), where the Council declared void and without legal effects the new constitution and the elections carried out in that country by the racist Government of South Africa. Moreover, the Council itself declared in explicit terms the radical nullity of all acts taken by the wrongdoing State with regard to the unlawful situation. Compare in addition resolution 217 (1965) on Southern Rhodesia, and resolutions 664 (1990) and 687 (1990), concerning respectively the nullity of the Iraqi decrees of closure of foreign diplomatic missions in Kuwait and declarations by Iraq concerning its external debts. On these points see V. Gowland-Debbas, "Security Council Enforcement Action ...," op. cit., pp. 74-76.

20/ Here too, illustrations are provided by the Security Council's practice. In addition to the resolutions cited in the preceding footnote, see the explicit terms of resolution 218 (1965), by which the Council requested all States "to refrain forthwith from offering the Portuguese Government any assistance which would enable it to continue its repression of the peoples of the Territories under its administration".

21/ As for these obligations, reference may be made to Security Council resolution 402 (1976) in which the Council, after commending Lesotho for its decision "not to recognize the so-called independence of Transkei" granted by South Africa, appealed to all States "to provide immediate financial, technical and material assistance to Lesotho so that it can carry out its economic development programmes and enhance its capacity to implement fully the United Nations resolutions on apartheid and bantustans" (see also the subsequent resolution 535 (1983)). The practice of the Council seems to confirm that such assistance takes mainly the form of "economic" aid and support offered to countries particularly exposed to the negative impact of the political and economic isolation of the law-breaking State. Relevant in this respect are the various cases of assistance afforded by the Council on

in addition that the omnes injured States should coordinate, in so far as possible, their respective reactions.

67. The enunciation of the positive obligation to cooperate could usefully be supplemented by a mention of the more precise and perhaps more significant duty not to hinder in any way the action of the States which choose to exercise their right to react to a crime. Such a provision would more clearly outlaw the conduct of any State which not only abstains from reacting to a grave infringement of a fundamental legal interest of the international community but thwarts - by action or omission - the measures put into effect by other States or otherwise reduces their effectiveness. 22/

68. Further useful additions would be:

(i) a provision concerning the implementation of the dedere aut iudicare principle vis-à-vis individuals accused of "connected" delicta iuris gentium;

(ii) a provision relating to cooperation with international bodies which may be involved in the reaction to a crime;

(iii) a provision under which the omnes injured States should facilitate the adoption and implementation of lawful measures called for by emergencies caused by the crime.

69. The relevant draft article 18 covering the two sets of provisions referred to in paragraph 61 above appears in addendum 1 to this document.

C. The indispensable role of international institutions

1. General

70. Aside from being objectively more severe, the substantive and instrumental consequences of crimes present, as noted, the difference

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the basis of Article 50 of the United Nations Charter (see, inter alia, resolutions 386 (1976) and 669 (1990)). Concerning the mutual assistance obligation, it should also be possible to remedy the problem deriving from resort to countermeasures (or other forms of political pressure) which may, because of their intensity, affect the rights of States other than the law-breaking State.

22/ To illustrate this point, we recall, by way of analogy, the resolutions of the Security Council condemning the attitude of countries which, by maintaining economic or diplomatic relations with the law-breaking State, contribute to reducing the effectiveness of the reaction against such State. See for instance paragraph 6 of resolution 277 (1970), where the Council "Condemns the policies of the Government of South Africa and Portugal, which continue to maintain political, economic, military and other relations with the illegal régime of Southern Rhodesia in violation of the relevant resolutions of the United Nations"; compare also resolutions 253 (1968), 314 (1972), 320 (1972), 333 (1973), 437 (1978), all related to the Southern Rhodesian case.

reflected in paragraph 3 of article 5 of Part Two of the draft as adopted on first reading. We refer to the difference inherent in the fact that while most - albeit not all - delicts involve only one or a few injured States, any crime may involve, possibly (albeit not always) in different degrees, all States as injured States.

71. The fact that all States are involved as injured States does not mean, on the other hand, that the implementation of the consequences of crimes is structurally different from the implementation of the consequences of most delicts. In both cases the actors are States. This is obvious for those consequences of internationally wrongful acts which are common to both categories of wrongful acts and is equally true for those special or supplementary consequences which have been considered in the previous section as attaching exclusively to crimes. In the predominantly inorganic condition of the inter-State system, even the implementation of the consequences of internationally wrongful acts resulting - in the words of paragraph 2 of article 19 - "from the breach ... of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole" seems to remain in principle, under general international law, in the hands of States.

72. This obvious corollary of the absence, in the inter-State system, of authoritative institutions for the enforcement of the law is of course not surprising. Even in the area where States have entrusted an international institution with the far-reaching function of taking direct forcible measures for the maintenance of peace, it is always through the action of States that effective enforcement actually takes place. The concept of an "organised international community" is, indeed, an overstatement. 23/

73. Considering the gravity of crimes and the severity of their special or supplementary consequences, very serious difficulties might arise from a universalization of the status of injured State. The risks of arbitrariness, inconsistencies and conflict involved in deciding on the existence of a crime and its attribution and in subsequently implementing the consequences will be very high. Unlike the implementation of responsibility for delict which normally concerns two or a few States, the implementation of responsibility for crimes involves the omnes injured States and the risks of arbitrariness and conflict increase geometrically. 24/

23/ Our serious perplexities with regard to the current theories on international organization are expressed, inter alia, in "The Concept of International Law and the Theory of International Organization", Appendix to "The Normative Role of the General Assembly", Haque Recueil, 1972, III, pp. 629-731, esp. pp. 663 ff.; "Le domaine réservé, l'organisation internationale et le rapport entre droit international et droit interne", op. cit., pp. 151-161, 402-427 and 435 ff; and "Reflections on the Problem of Organisation in Integrated and Non-Integrated Societies" in Rivista di Diritto Internazionale, 1961, pp. 585-603.

24/ Some of the problems were identified by a number of speakers at the Florence symposium of 1984 (International Crimes of States, by Weiler, Cassese, Spinedi (eds.), Berlin, New York, 1988). An example is Stein, at pp. 198 ff.

74. The Commission would therefore be ill-advised if it did not try to reduce the area of potential discord in implementation. The 1994 debate shows that all the members of the Commission - including those who advocated the abandonment of the distinction embodied in article 19 - are fully aware of the importance of the issue.

75. Some of the institutional problems which could arise in connection with the implementation of the rules relating to international crimes of States were discussed in our fifth report; 25/ and institutional problems have been evoked more or less explicitly - although rather vaguely - in the course of last year's debate and not only by members favouring the distinction embodied in article 19. A closer look at the possible options now seems indispensable. 26/

76. From the 1994 debate itself and from an analysis of the reactions of States and international bodies to breaches akin to those singled out in the four subparagraphs of paragraph 3 of article 19, there emerges a number of theoretical options (more or less innovative) which should be explored.

77. The conceivable options seem to be:

(i) a high degree of institutionalization - through resort to existing international organs or to organs to be created - of the totality or the greater part of the process of implementation of the consequences of crimes, starting from the decision on the existence and attribution of a crime and moving to the determination of the actual substantive and instrumental consequences of the breach. Within the framework of the same option, one could go one step further in the direction of institutionalization and entrust even the actual application of any or all of the special or supplementary consequences to the same or to another international organ;

(ii) a more or less reduced degree of institutionalization through resort to existing international organs. This option would include any formula other than the most ambitious ones, the minimal solution being to entrust to one or more existing international

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25/ Fifth report (A/CN.4/453/Add.3), paras. 89-117.

26/ The problem of the possible forms of "institutionalized" reaction to violations of erga omnes obligations which could fall under the category of international crimes has been deeply debated in literature: see, inter alios, J.A. Frowein, "Collective Enforcement of International Obligations" in ZaöRV, 1987, esp. pp. 73-77; K. Hailbronner, "Sanctions and Third Parties and the Concept of International Public Order" in Archiv des Völkerrechts, 1992, pp. 2 ff.; B. Simma "Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations erga omnes?" in The Future of International Law Enforcement. New Scenarios - New Law? Delbruck (ed.), Berlin, 1992, pp. 125 ff.; P. Picone, "Nazioni Unite e Obblighi 'erga omnes' in La Comunità Internazionale, 1993, pp. 709 ff.; C. Annaker, "The Legal Régime of Erga Omnes Obligations in International Law", op. cit., esp. pp. 156 ff.

bodies the determination that triggers any process of implementation of the consequences of a crime, namely the determination as to whether a crime has been or is being perpetrated and as to whether the breach is attributable to one or more given States.

2. Instances of "organized" reaction to violations of fundamental international obligations

78. Important instances of institutional reaction to gross violations of international obligations akin to those which would be condemned as crimes under article 19 can be found in the practice of the United Nations General Assembly and Security Council. We deem it necessary to make clear, however, that in referring to any such instances in the following paragraphs and footnotes we shall let aside both the merits of the United Nations reactions in each particular instance, on one side, and the precise legal qualification of case from the viewpoint of State responsibility, on the other side.

79. To begin with the reaction of the General Assembly in cases probably falling under paragraph 3 (a) of article 19, one may recall the numerous resolutions by which that organ strongly condemned during the sixties and the seventies the aggressive policies carried out by some colonial or racist States - such as Portugal, South Africa or the minority régime of Southern Rhodesia - towards dependent populations or neighbouring States on the African continent. 27/ One may also mention - again without taking a stand on the merits of each situation - several resolutions by which the General Assembly condemned armed attacks by Israel against the territory of Lebanon, or explicitly qualified as "aggressive" the policy of that State in the territories occupied after 1967. 28/ Other important instances of vigorous

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27/ See, for instance, the preambular part of resolution 3113 (XXVII), where the General Assembly condemned "the repeated acts of aggression committed by armed forces of Portugal against independent African States, which constitute a violation of the sovereignty and territorial integrity of those States", and found these activities likely to "seriously disturb international peace and security" (in the same sense see also resolutions 2707 (XXV) and 2795 (XXVI)). Similar findings are reflected in resolutions 31/154 A and 32/116 in connection with the armed attacks conducted by the Southern Rhodesian régime against the territories of Botswana, Mozambique and Zambia. As for South Africa, the General Assembly condemned in an impressive series of resolutions what it qualifies as acts of aggression perpetrated by that Government from the non-independent territory of Namibia against Angola, Botswana, Lesotho and Zambia: see, inter alia, resolutions 31/146, 32/9 D, 33/182 A, 33/206, 38/36 A, 38/17, 39/50 A, 40/25, 40/97 A, 41/39 A and 42/14 A.

28/ Particularly explicit are the terms of resolutions 38/17, by which the General Assembly "Strongly condemn[ed] the massacre of Palestinians and other civilians in Beirut and the Israeli aggression against Lebanon, which endangers stability, peace and security in the region", and the terms of resolutions 37/123 A, by which the Assembly declared that "Israel's decision of 14 December 1981 to impose its laws, jurisdiction and administration on the occupied Golan Heights constitutes an act of aggression under the provisions

condemnation of acts of aggression by the Assembly include Israel's armed attack against the Iraqi nuclear plant "Osiraq", 29/ the United States bombing of Tripoli and Benghazi, 30/ and the USSR intervention in Afghanistan. 31/ More recently, the Assembly strongly condemned the continuing violations of the territorial integrity and sovereignty of Bosnia-Herzegovina and asked for the immediate cessation of such "aggressive and hostile" acts. 32/

80. The General Assembly also reacted in a number of situations probably falling under subparagraph (b) of paragraph 3 of article 19 dealing with colonial occupation and domination maintained in breach of the principle of self-determination. At the general level, the Assembly asserted in a number of resolutions the "criminal" character of such policies and described them as a potential threat to international peace and security. 33/ The Assembly did not hesitate to denounce explicitly the individual States it considered to be responsible of such practices. Suffice it to recall - without, here again, entering into the merits of each case - the "colonial rule" of Portugal in the African territories under its administration, 34/ the "illegal" presence of

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of Article 39 of the Charter of the United Nations and General Assembly resolution 3314 (XXIX)" and found "all Israeli policies and practices of, or aimed at, annexation of the occupied Palestinian and other occupied territories to be in violation of international law and of the relevant United Nations resolutions". On the Lebanese question, see also resolutions 35/207, ES - 7/5, 37/43 and 40/25. For further condemnations of the allegedly illegal and aggressive Israeli policies in occupied territories, see, inter alia, resolutions 38/180 A, 39/146 B, 40/168 B, 41/162 B, 42/209 C, 43/54 B, 44/40 B and 45/83 B.

29/ Resolution 36/27, where the General Assembly "Strongly condemns Israel for its premeditated and unprecedent act of aggression in violation of the Charter of the United Nations and the norms of international conduct, which constitutes a new and dangerous escalation in the threat to international peace and security".

30/ See resolution 41/48.

31/ See resolution ES-6/2 (1980).

32/ See for instance resolution 47/121.

33/ Compare the set of resolutions devoted to the question of the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples inter alia resolutions 2189 (XXI), 2326 (XXII), 2465 (XXIII), 2548 (XXIV), 2621 (XXV), 2708 (XXV), 2878 (XXVI), 2908 (XXVII), 3163 (XXVIII), 3328 (XXIX), 3481 (XXX), 31/143, 32/42, 33/44, 34/93, 35/118 and 35/119.

34/ See for instance para. 4 of resolution 2270 (XXII), where the General Assembly "Strongly condemns the colonial war being waged by the Government of Portugal against the peaceful peoples of the Territories under its domination, which constitutes a crime against humanity and a grave threat to international

South Africa in Namibia, 35/ the rule of the minority régime of Southern Rhodesia 36/ and the policy of Israel in the Palestinian occupied territories. 37/

81. As for the type of crime provided for in subparagraph (c) of paragraph 3 of article 19, namely, a "serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being", a well-known example is the Assembly's reiterated condemnation of the racial régime of South Africa and the Assembly's call to the Security Council for the adoption of measures under Chapter VII of the Charter. 38/ Most recently, the Assembly also reacted to massive violations of human rights coming under the concept of genocide: repression of the Kurdish and Scihite minorities in Iraqi territory, "ethnic cleansing" and other systematic mass violence and abuse in Bosnia-Herzegovina. 39/

82. Examples of "institutional" reactions to situations likely to fall under the category of international crimes may also be found, of course, in the practice of the United Nations Security Council. We may recall, with regard to aggression, the two precedents of the Korean War and the Gulf War. In both cases, the Security Council reacted so strongly - after determining that a breach of international peace had occurred - as to recommend or authorize the use of armed force by Member States. 40/ Short of such extreme reactions, strong condemnations of instances of aggression were voiced by the Council in a number of other cases, some of which have already been mentioned with

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peace and security". In the same direction also resolutions 2107 (XX), 2395 (XXIII), 2707 (XXV), 2795 (XXVI) and 3113 (XVIII).

35/ See, inter alia, resolutions 2074 (XX), 2145 (XXI), 2325 (XXII), 2403 (XXIII), 2517 (XXIV), 2678 (XXV), 2871 (XXVI), 3031 (XXVII), 3111 (XXVIII), 3295 (XXIX) and also the resolutions cited supra, footnote 27.

36/ See, inter alia, resolutions 2022 (XX), 2151 (XXI), 2383 (XXIII), 2508 (XXIV), 2652 (XXV), 2946 (XXVII), 3115 (XXVIII), 3116 (XXVIII), 3297 (XXIX), 3298 (XXIX) and 3396 (XXX).

37/ See for instance resolutions 3414 (XXX), 31/61, 32/20, 33/29, 34/70, ES-7/2, 35/35 A, 35/169 A, 36/266 A, 37/86 E, 37/123 F, 38/17, 38/180 D, 39/146 A, 40/25, 40/168 A, 41/101, 41/162 A, 42/95, 42/209 B, 43/54 A, 44/40 A, 45/83 A and 46/82.

38/ See inter alia resolutions 2202 (XXI) A, 2307 (XXII), 2369 (XXIII), 2506 (XXIV) B, 2671 (XXV) F, 2775 (XXVI) F, 2923 (XXVII) E, 3151 (XXVIII) G, 3324 (XXIX) E, 31/6 I, 32/105 K, 33/24, 38/11 and 41/35 A.

39/ See respectively resolution 46/136 of 17 December 1991 and resolutions 47/147 of 18 December 1992 and 48/88 of 20 December 1993.

40/ For the Korean case, see in particular resolutions 82 (1950), 83 (1950), 84 (1950); for the Gulf War, see in particular resolutions 660 (1990) and 678(1990).

reference to the Assembly. 41/ More recently, the Security Council found that the continuing acts of aggression directed against the territory of Bosnia-Herzegovina by the Serbian army were likely to constitute a grave threat to international peace and security and, on that basis, imposed a series of enforcement measures against the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) for its assistance to irregular Serbian units. 42/

83. Not differently from the General Assembly, the Council has uttered strong condemnations of the colonial and repressive practices violating the principle of self-determination. In some instances, it has also adopted measures under Chapter VII of the Charter. One may recall the Portuguese policies in overseas territories, the illegal occupation of Namibia by South Africa and the minority regime of Southern Rhodesia. 43/

84. The Council reacted similarly to massive violations of human rights. Noteworthy are in this respect the resolutions condemning the policy of apartheid of the South African Government, 44/ and those related to

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41/ Specifically, the Security Council condemned in various resolutions the aggressions perpetrated by racist or colonial powers on the African continent against the territorial integrity of neighbouring independent States. See resolutions 268 (1969), 275 (1969), 289 (1970), 290 (1970), 273 (1969), 294 (1971), 302 (1971) and 321 (1972) for armed attacks directed by Portugal against Zambia, Guinea and Senegal; resolutions 326 (1973), 328 (1973), 424 (1978), 455 (1979), 403 (1977), 411 (1977) for similar acts perpetrated by the minority racial régime of Southern Rhodesia against Zambia, Botswana and Mozambique; resolutions 300 (1971), 466 (1980), 403 (1977), 406 (1977), 387 (1976), 428 (1978), 447 (1979), 454 (1979), 475 (1980), 545 (1983), 546 (1984), 567 (1985), 571 (1985), 574 (1985), 577 (1985), 602 (1987), 527 (1982) and 580 (1985) for what concerns the repeated aggressions launched by South Africa from the non-independent territory of Namibia against Zambia, Botswana, Angola and Lesotho. As further examples, one may mention resolution 487 (1981), by which the Council deplored the attack of Israel against the Iraqi nuclear plant and resolutions 573 (1985) and 611 (1988) by which the Council condemned the same State for acts of aggression perpetrated against the territorial integrity of Tunisia.

42/ See in particular resolutions 752 (1992), 757 (1992), 787 (1992), 819 (1993) and 829 (1993).

43/ See for the Portugal issue, resolutions 180 (1963), 183 (1963), 218 (1965), 312 (1972) and 322 (1972); on the Namibian question resolutions 264 (1969), 269 (1969), 276 (1970), 283 (1970), 301 (1971), 310 (1972), 366 (1974), 385 (1976), 349 (1978), 539 (1983) and 566 (1985); and on the case of Southern Rhodesia, resolutions 216 (1965), 217 (1965), 221 (1966), 232 (1966), 253 (1968), 277 (1970), 388 (1976) and 409 (1977).

44/ Explicit in this regard is resolution 473 (1980), where the Council declared that "the policy of apartheid is a crime against the conscience and dignity of mankind and is incompatible with the rights and dignity of the man, the Charter of the United Nations and the Universal Declaration of Human

genocide in Iraqi Kurdistan and "ethnic cleansing" in the territory of former Yugoslavia. 45/

3. Conceivable options for an "organized" determination of existence/attribution of an international crime

85. Going back to our problem and to the possible solutions considered in paragraph 77, supra, the first option indicated in paragraph 77 (i) does not seem to be practical. Although such a degree of institutionalization of the reaction of an "organised international community" to crimes may be theoretically desirable, and might occasionally be achieved in limited, specific areas, it would require a major development of the inter-State system which is very unlikely to occur in the foreseeable future.

86. On the other hand, the alternative option indicated in paragraph 77 (ii) is, in our view, worthy of serious consideration. Although it would also involve a relatively high degree of progressive development, it seems to us much less problematic. Express or implied indications in comparable directions did emerge from last year's debate.

87. That debate shows conclusively, in particular, that the most crucial problem to be faced in the application of any rules that the Commission may adopt (de lege lata or de lege ferenda) with regard to the special or supplementary consequences of crimes, relates to determination of the existence of any such wrongful act and its attribution to one or more States. Surely, this problem arises for any internationally wrongful act, whatever its degree of gravity; and it becomes particularly acute whenever the breach - even if it constitutes a mere delict - involves more than one injured State. But the exceptional gravity of crimes and the fact that they involve all States as injured States requires imperatively that some form of collective determination be made, by an international body, as regards the prerequisite to implementation of the consequences of a crime, namely the existence of a breach and its attribution. A number of solutions could theoretically be envisaged in the light of the specific functions of available international organs.

Rights, and seriously disturbs international peace and security"; see also, inter alia, resolutions 181 (1963), 182 (1963), 190 (1964), 191 (1964), 417 (1977), 418 (1977), 554 (1984), 556 (1984), 596 (1985)and 591 (1986).

45/ For the Kurdish case, see resolution 688 (1991); for the gross violations of human rights in the former Yugoslavia, see in addition to those mentioned in footnote 39 above, resolutions 770 (1992) and 771 (1992). On the Security Council action in cases concerning gross violations of human rights, see inter alios: G. Gaja, "Genocidio dei Kurdi e dominio riservato" in Rivista di Diritto Internazionale, 1991, pp. 95 ff.; P. Malanczuk, "The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War" in European Journal of International Law, 1991, pp. 114 ff.; P. Alston, "The Security Council and Human Rights: Lessons to be Learned from the Iraq-Kuwait Crisis and its Aftermath" in Australian Yearbook of International Law, 1992, pp. 107 ff.; and B.G. Ramcharan, "The Security Council: Maturing of International Protection of Human Rights" in The Review, 1992, pp. 24 ff.

(i) A determination made exclusively by the ICJ, the General Assembly or the Security Council?

88. Prima facie the most appropriate choice should be dictated by the essentially judicial nature of the determination in question. One would thus be led to the obvious conclusion that, although the implementation of the consequences would remain - as in the case of delicts - in the hands of States, the determination as to the existence and attribution of the breach should emanate from the most authoritative and representative judicial body at present in existence, namely, the International Court of Justice (ICJ). The ICJ is the only existing permanent body possessing, in principle, the competence and the technical means to determine the existence, attribution and consequences of an internationally wrongful act. 46/

89. Such a solution, obviously implying the acceptance (in the future convention on State responsibility) of the ICJ's compulsory jurisdiction, would come across at least two serious obstacles. In the first place, one does not find, at the side of a strictly judicial organ like the ICJ, any international institution performing the task of a prosecutor. The Court itself would not be in a position to "filter" or "screen", so to speak, the allegations levelled against allegedly criminal States. Secondly, once the ICJ were endowed with the indispensable compulsory jurisdiction, even for the limited purpose of the basic determination in question, it would be difficult to confine such a general jurisdictional link to the area of hopefully infrequent internationally wrongful acts defined as crimes. Any State could, by alleging that another State has committed or is committing a crime, bring that State before the Court for the purpose of determining the existence of a mere delict.

90. Another theoretically conceivable option would be that the future convention entrust the determination in question to the United Nations General Assembly or to the Security Council.

91. The General Assembly would seem to be particularly appropriate for a number of reasons. Compared to the Security Council in particular, the General Assembly is generally considered to be more "democratic". Furthermore, the quasi universality of the organization results in the General Assembly being the most "representative" spokesman not only of the so-called "organized international community" but of the international community itself. The General Assembly appears thus to be more qualified than any existing international body to impersonate, so to speak, that "international community as a whole" which article 19 identifies as being at the root of the qualification of certain types of internationally wrongful acts as international crimes and to translate into concrete, ad hoc pronouncements the general definitions of international crimes emanating in abstracto, as indicated in article 19, from that "community". 47/

46/ See our considerations in the fifth report (A/CN.4/453/Add.3), para. 106.

47/ In the measure in which the expression "international community as a whole" coincides with the expression "international community" tout court, the above mentioned reference in article 19 would be applicable to any rule of

92. A further feature of the General Assembly which makes it particularly suitable for the purpose under consideration is the very broad range of its competence ratione materiae, which encompasses not only - albeit with very different powers - the main (and far more focused) area of responsibility of the Security Council, i.e. the maintenance of international peace and security, but also areas of international cooperation governed by rules the most serious infringements of which correspond to the three classes of international crimes contemplated, in addition to aggression, in paragraph 3 of article 19. We refer to such areas as economic, social and cultural cooperation and such rules as those relating to self-determination, human rights, the protection of the environment, not to mention the progressive development and codification of international law. The Assembly is thus clearly competent to deal - de lege lata as well as de lege ferenda - with all four areas where serious breaches such as those characterized as crimes in article 19 may occur.

93. On the other hand, the General Assembly has no competence to make determinations in the area of State responsibility. In addition, the General Assembly does not have the power to take binding decisions, except in specific

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customary international law. It must be noted, however, that such might or might not be the case if one understood the expression "international community as a whole" in the sense in which it was understood by the Commission in 1976. It will be recalled that the formula "international community as a whole" appearing in para. 2 of article 19 of Part One of the draft as adopted on first reading, had previously appeared in articles 53 and 64 of the Vienna Convention of the Law of Treaties (see, inter alios, R. Ago, Droit des traités à la lumière de la Convention de Vienne - Introduction, Haque Recueil, 1971, v. III, p. 323, and J. Combacau and S. Sur, Droit International Public, 1993, pp. 158-159). The formula is explained by the ILC (following Ago's fifth report), in para. (61) of the commentary to article 19: "It certainly does not mean the requirement of unanimous recognition by all the members of [the international] community, which would give each State an inconceivable right of veto. What it is intended to ensure is that a given internationally wrongful act shall be recognized as an "international crime", not only by some particular group of States, even if it constitutes a majority, but by all the essential components of the international community" (Yearbook of the International Law Commission 1976, Vol.II, Part Two, p. 119).

Of course, the phrase "essential components of the international community" was understood to refer to the three main groupings into which the General Assembly appeared at the time to be divided. Although groupings can surely still be identified from various viewpoints within the Assembly, that particular division would now seem to be anachronistic. It will be for the Commission to reconsider the matter when it reverts to the formulation of article 19. For the time being, one has no choice but to refer simply to the "international community".

Pertinent considerations on the role of the "international community as a whole" as a source of qualification of serious breaches as international crimes of States are formulated by G. Palmisano ("Les causes d'aggravation de la responsabilité ..." op. cit., pp. 638-639), who cites other authors and quotes verbatim the relevant passage of Ago's fifth report.

areas, e.g. for the purposes of Articles 5, 6, and 17, paragraph 2, of the Charter, and in procedural matters. Although procedural questions surely could cover the establishment of ad hoc subsidiary bodies to investigate, for example, facts possibly amounting to an international crime, mere recommendations by the Assembly would not carry a sufficient weight to form the basis of an authoritative legal determination as to the existence of a crime and its attribution. The General Assembly would not, therefore, seem to be - despite its relatively more "representative" character - the appropriate body to be made solely responsible for the determination in question.

94. Moving to the Security Council, the determination of the existence of an act of aggression, a function entrusted to the Council by the Charter - albeit not for establishing State responsibility - could be considered to provide the basis for the implementation by States of the consequences of the crime defined in subparagraph (a) of paragraph 3 of article 19. A role could also be envisaged for the Council with regard to the kinds of crimes covered by subparagraphs (b), (c) and (d) of paragraph 3 of article 19, bearing in mind the Council's competence to determine, under Article 39, breaches and threats to the peace, and particularly the latter. The practice of the Council reveals in fact instances of findings of threats to the peace - albeit in principle, it is true, for the exclusive purposes of Chapter VII - in the context of situations comparable to those involving crimes under subparagraphs (b), (c) and (d) of paragraph 3 of article 19 and the written or unwritten primary rules implied therein. 48/

95. Without prejudice, of course, to the Security Council's powers relating to the maintenance of international peace and security it does not seem that the Council could, any more than the General Assembly, be made solely responsible for the basic legal determination that should be a prerequisite for the implementation by States of the consequences of crimes. That determination pertains appropriately to the application of the law of international responsibility rather than the maintenance of international peace and security. 49/

48/ See, for instance, resolution 688 (1991) concerning acts of genocide by the Iraqi Government against Kurdish population; and resolutions 757 (1992) and 787 (1992) relating to the situation in the former Yugoslavia, where massive human rights violations have been committed.

49/ The distinction was stressed by us in 1992 when we contested our predecessor's formulation of article 4 of Part Two of the draft where the law of State responsibility seemed to be unduly subordinated to the provisions and procedures of the Charter relating to the maintenance of international peace and security. See A/CN.4/SR.2277, pp. 3-5 and Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10 (A/47/10), paras. 261-266.

The matter is closely interrelated with the distinction between the powers of the Security Council under Chapters VII and VI of the Charter, the latter powers being confined to mere recommendation. See, in this respect, in addition to the cited summary record (A/CN.4/SR.2277), the summary record of the 2267th meeting (A/CN.4/SR.2267), p. 21. Adde B. Graefrath, "Leave to the Court ...", op. cit., pp. 190 ff. and see paras. 136-138 infra.

96. Despite the interaction between these two crucial areas of inter-State relations, requiring that body solely to proceed to the basic determination in question would be at least as problematic as asking the Assembly singly to discharge that same function. The Council might appear better equipped to do so in view of the binding force of its decisions, but it would be less suitable than the Assembly because of its restricted membership and the specificity of its competence ratione materiae.

97. Be it as it may of the considerations respectively applicable to the Assembly and the Council, the main difficulty resides for both in the political nature of their composition and role:

(i) both bodies operate with a high degree of discretionality. They act neither necessarily nor systematically in all the situations that would seem to call for the exercise of their competence. They operate, instead, in a selective and at times very selective way;

(ii) neither body is bound to use uniform criteria in situations which may seem quite similar. Consequently, situations of the same kind and gravity can be treated differently or not treated at all;

(iii) the very nature of their determinations seems to exclude any duty on their part to motivate their choices (in the form of decision, action or inaction) from the viewpoint of international law;

(iv) the discretionary and possibly arbitrary character of their choices is further aggravated by the fact that, in the absence of legal motivation, no contemporary or subsequent verification of the legitimacy of actual choices and no comparison between such choices are possible. 50/

Some of the complexities of the relationship between Security Council determinations and the law of State responsibility are considered by, inter alios, G. Gaja, "Réflexions sur le rôle du Conseil de sécurité dans le nouvel ordre mondial" in Revue générale de droit international public, 1993, pp. 298 ff.; D. Bowett, "The Impact of Security Council Decisions on Dispute Settlement Procedures" in European Journal of International Law, 1994, pp. 89 ff.; V. Gowland-Debbas, "Security Council Enforcement Action ...", op. cit., esp. pp. 61-73.

As noted by the Swiss Government with respect to a well-known problem arising within the framework of the topic "Draft Code of Crimes against the Peace and Security of Mankind", "To suggest that decisions of the Security Council, a political organ if ever there was one, should serve as a direct basis for national courts when they are called upon to establish individual culpability and determine the severity of the penalty does not seem to be in keeping with a sound conception of justice" (Thirteenth report on the topic "Draft Code of Crimes against the Peace and Security of Mankind" by Mr. Doudou Thiam, Special Rapporteur (A/CN.4/466), para. 41).

50/ The problem of the lack of control on United Nations political organs - and in particular on the Security Council - has been considered by many scholars: see, for instance, T. Franck, "The 'Powers of Appreciation':

98. From the above features it is clear that neither the involvement of the General Assembly nor that of the Security Council could satisfy the most elementary requirements of a legal determination as to the existence and attribution of an internationally wrongful act, let alone of an international crime of State. Much as one must concede to the unique structure of the inter-State system, any ascribing of responsibility should presuppose, as shown by the history of the law of national societies:

(i) subjection to the rule of law, at the procedural as well as substantive levels;

(ii) continuity, systematicity and impartiality - or non-selectivity - with regard to the infringements of the law. 51/

99. We also briefly considered, in our fifth report, whether recent practice might not indicate that the scope of the Council's competence had undergone an evolution with regard precisely to the "organized reaction" to certain types of particularly serious international delinquencies. However, that practice could only be viewed as having endowed the Council with a competence in the area of State responsibility for crimes if it could be convincingly established that it is a "juridically decisive" practice. Such a conclusion would at all events, in our view, be very problematic to reach de lege lata; 52/ and it does not appear that a solution of the kind would be appropriate as a matter of progressive development of the law of international organization. 53/

(ii) Political and judicial roles combined

100. The features of the ICJ, the General Assembly and the Security Council considered in the preceding paragraphs seem thus to suggest that none of those bodies could properly discharge by itself, individually, the delicate function

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Who Is the Ultimate Guardian of UN Legality?" in American Journal of International Law, 1992, p. 519; E. Sciso, "Può la Corte Internazionale di Giustizia rilevare l'invalidità di una decisione del Consiglio di Sicurezza?" in Rivista di Diritto Internazionale, 1992, pp. 932 ff.; G. Gaja, "Réflexions sur le rôle du Conseil de sécurité dans le nouvel ordre mondial" in Revue générale de droit international public, 1993, pp. 314-317; D. Bowett, "The Impact of Security Council Decisions ...", op. cit., pp. 97 ff.; V. Gowlland-Debbas, "The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case" in American Journal of International Law, 1994, pp. 643 ff.; M. Bedjaoui, Nouvel ordre mondial et contrôle de la légalité des actes du Conseil de sécurité, Bruxelles, 1994, passim; L. Condorelli, "La Corte internazionale di giustizia e gli organi politici delle Nazioni Unite" in Rivista di Diritto Internazionale, 1994, pp. 897 ff. See also the literature on the Lockerbie case cited in footnote 9 above.

51/ Fifth report (A/CN.4/453/Add.3), para. 103.

52/ Ibid., paras. 104-105.

53/ Ibid., Section 3, paras. 149 ff.; and paras. 135-137.

of determining the existence of an international crime of State and its attribution as prerequisites to the implementation of the consequences contemplated in the relevant articles of the draft on State responsibility. One must devise, therefore, a different solution: and that solution seems to be dictated by the respective features of the three main United Nations bodies.

101. On the one hand, the Assembly and the Security Council are too exclusively political to be entrusted with such an eminently juridical function as that of determining the existence and attribution of an international crime. On the other hand, the International Court of Justice, while endowed with the necessary juridical capacity, is not endowed with the no less indispensable specific competence; and it would be inappropriate, as explained, to confer upon it an unconditional, direct competence with respect to crimes, that would inevitably develop into an unwanted generalized compulsory jurisdiction with regard to delicts as well. The only solution seems to lie in a combination of the political element with the judicial element in such a manner as to avoid the drawbacks of both an exclusively political and an exclusively judicial determination. We think of a political assessment, by the General Assembly or the Security Council, of the allegation of the accusing State (or States) aimed at determining if the allegation is serious enough to justify the serious concern of the international community; such a political pronouncement would then open the way to a possible involvement of the International Court of Justice.

102. As regards the political body's role, it should consist in the adoption of a resolution by a qualified majority. For the General Assembly, we think of a two-thirds majority of the members present and voting. For the Security Council, two possibilities could be envisaged as a matter of principle. The first theoretical possibility would be to require a mere two-thirds majority, without further qualification. Such a solution would call into question the principle of the unanimity of the permanent members and could only be considered within the framework of a revision of the Charter. The second possibility would be to provide that, in conformity with the principle set forth in Article 27 of the Charter, "a party to a dispute shall abstain from voting". This alternative seems to be a fair and realistic one.

103. The nature of the ICJ's pronouncement could be envisaged in different ways of unequal juridical appeal. One possibility would be to involve the judicial body in its consultative capacity. Any Member State of the United Nations party to the convention on State responsibility alleging that a crime has been or is being committed would be entitled to submit the matter to the General Assembly, or the Security Council. Either political body would debate the matter and, upon finding that the allegation of the accusing State (or States) is serious enough to justify the involvement of the international community, would decide to submit the issue to the ICJ for an advisory opinion. A negative pronouncement of the Court would put the matter to rest (without prejudice, of course, to issues relating to the existence, attribution or consequences of a delict). A positive pronouncement of the Court accepted by the requesting body would allow any State party to the convention on State responsibility to implement the provisions relating to the legal consequences of a crime as set forth in Part Two of the draft.

104. Another possibility would be to involve the judicial body in its contentious function. The debate of the Assembly or the Council following upon an allegation of crime would conclude not with a request for an advisory opinion of the ICJ but with the adoption of a resolution finding that the allegation deserves serious consideration by the international community. The adoption of such a resolution by a qualified majority of either political body - in the sense explained - would enable, on the strength of the convention on State responsibility, any participating Member State of the United Nations (including the alleged "criminal") to bring the matter to the ICJ for it to decide on the existence of a crime and its attribution. In other words, the resolution of the Assembly or the Security Council would, by virtue of the convention on State responsibility, create among the participating Member States of the United Nations, the "jurisdictional link" necessary for the ICJ to have compulsory jurisdiction.

105. A number of reasons seem to militate in favour of the second alternative.

106. Firstly, the seriousness of an allegation of crime and the gravity of the eventual consequences suggest that it would not be appropriate to rely, for the basic determination in question, upon a consultative opinion.

107. Much as one may consider the Court's pronouncements as essentially equivalent in authority, regardless of whether they are labelled advisory opinion or judgment, there are marked differences. 54/ One difference lies in the extent to which issues of fact are of importance for all consultative opinions as they are in all contentious cases. 55/ Another, more important, difference lies in the fact that, while the Court's pronouncement in a contentious case normally settles the issue or issues in the sense that it decides the merits of a dispute in its entirety - thus operating, in a way, as the decisive utterance on the issue or issues at stake - the Court's pronouncement in an advisory case is normally intended to give guidance on an

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54/ See P. Benvenuti, L'accertamento del diritto mediante i pareri consultivi della Corte Internazionale di Giustizia, Milano, 1985, passim.

55/ The Permanent Court of International Justice has taken the view that in the case of a consultative procedure, it was not barred from considering questions of fact. It has however noted at the same time that "under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are" (Eastern Carelia case, PCIJ, Series B, No. 5, pp. 28 ff.). The ICJ has confirmed this stand in the Western Sahara Case, ICJ Reports, 1975, pp. 28 ff. The opinion that questions of fact remain, in principle, outside the consultative function of the ICJ is expressed by F. Vallat, "The Competence of the United Nations General Assembly", Hague Recueil, 1959, II, p. 216 and G. Morelli, "Controversia internazionale, questione, processo", in Rivista di Diritto Internazionale, 1977, p. 13.

issue for the addressee ultimately to act upon the issue. 56/ A further difference lies in the fact that the advisory procedure does not involve, as a rule, full-fledged contentious proceedings between litigant States.

4. An ICJ decision on existence/attribution as a prerequisite of the implementation by States of the consequences of an international delict

108. In the light of such considerations, we would be inclined to believe that the legal determination as to the existence and attribution of an international crime should be the result of a contentious procedure before the ICJ which would be initiated by any one of the omnes injured States following the political body's resolution and would give accusers and accused the possibility of thoroughly confronting each other within the framework of full and direct adversary proceedings.

109. A further and in our view decisive reason to make a Court judgment a prerequisite to the implementation by States of any legal consequences of an international crime derives from the features of the post-countermeasures dispute settlement procedure presumably to be envisaged in Part Three for the case of crimes. In view of the high degree of gravity of crimes, we plan to propose, for the relevant provision of Part Three, not just conciliation or arbitration (as we did for delicts) but a direct compulsory jurisdiction of the ICJ over any disputes arising from the implementation of the legal consequences of a crime (namely, post-countermeasures disputes relating to a crime). Considering further that our present proposals envisage a preliminary pronouncement of the ICJ upon the existence/attribution of a crime as a prerequisite to the lawful implementation of any consequences thereof, that pronouncement could not consist of a mere consultative opinion. As the Court could be called upon (under the relevant provisions of Part Three) to pronounce itself by way of a judgment in the post-countermeasures phase, it would be bizarre, to say the least, if the Court found itself, in that phase, in a situation where it would be obliged either to passively confirm its previous advisory opinion or to reverse that advisory opinion in the judgment.

110. The relevant provision appears in paragraph 2 of article 19 as contained in addendum 1 to this document.

111. This being said, one should bear in mind that the effects to be thus attributed by the future convention to resolutions of the General Assembly or the Security Council and to judgments of the Court should be without prejudice to the Security Council's functions under the Charter and the obligations of Member States deriving therefrom. The application of Article 51 of the Charter should also remain unaffected.

112. The problems envisaged in the preceding paragraph are covered by draft article 20 as it appears in addendum 1 to this document.

56/ As stated by the Court in the Advisory Opinion on the Interpretation of Peace Treaties, "[t]he Court's opinion is given not to the States but to the organ which is entitled to request it ... to obtain enlightenment as to the course of action it should take" (ICJ Reports, 1950, p. 71).

5. Further issues

(i) The ICJ's possible involvement under instruments other than the future convention on State responsibility

113. The provision whereby the ICJ would have compulsory jurisdiction (as amongst the participating States) to determine the existence and attribution of a crime once a General Assembly or Security Council resolution in the sense indicated in paragraph 102 supra had been adopted would not, in our view, exclude the possibility that the ICJ's compulsory jurisdiction for the same purpose might be instituted otherwise. It could in fact derive, for example, from a multilateral instrument among participating Member States characterizing a particular wrongful act as an international crime of State. Instances are the Conventions on Genocide (1948), Racial Discrimination (1966), Apartheid (1973), Discrimination against Women (1979) and Torture (1984). Compulsory jurisdiction of the Court (namely, jurisdiction involving the possibility of unilateral application) is contemplated in the Conventions on Genocide (art. IX), Racial Discrimination (art. 22), Discrimination against Women (art. 29) and Torture (art. 30). The Apartheid Convention (art. 12) is less clear. Furthermore, a competence of the ICJ could also derive, although less plausibly, from a bilateral dispute settlement instrument envisaging the ICJ's compulsory jurisdiction in such terms that either party could seize the ICJ with the claim that the other party has committed or is committing an international crime of State. Three interrelated questions would arise if any such "jurisdictional links" were used:

(i) quid iuris, for the purposes of the convention on State responsibility, where any State or States availed themselves of a jurisdictional link arising, for example, from one of the above-mentioned multilateral conventions in order to bring to justice an alleged wrongdoer?

(ii) should the applicant State or States be bound to comply, for the purposes of the convention on State responsibility, with the requirement of a (successful) prior recourse to the United Nations General Assembly or Council?

(iii) what would be, following such a judicial initiative taken outside the framework of the convention on State responsibility, the position of the "third" omnes States participating in the said convention?

114. The first question should be answered, in our view, in the sense that, if the convention on State responsibility were to provide, as proposed, that an ICJ finding of international crime fulfils the condition for the implementation of the consequences of that crime by the omnes injured States, an ICJ judgement to that effect should be considered to fulfil that condition, irrespective of the legal basis of the Court's jurisdiction. The fact that under the convention on State responsibility the ICJ's authority to decide the issue of the existence/attribution of an international crime would be subjected to the prerequisite of a United Nations political resolution should not restrict in any way the possibility that that ICJ function be validly performed on the basis of any titles of jurisdiction under Article 36 of the Court's Statute other than the convention on State responsibility. As a

logical consequence, question (ii) should be answered in the sense that, in case the ICJ were seized on the basis of a jurisdictional link originating from an instrument other than the convention on State responsibility, it would not be necessary to go through the preliminary political phase before the General Assembly or the Security Council. The requirement of an Assembly or Council resolution is designed - as explained in paragraph 89 supra - to avoid that the provision of the convention on State responsibility relating to the Court's role with respect to international crimes result in the Court's compulsory jurisdiction being extended to issues other than the existence/attribution of an international crime (e.g. the existence/attribution and consequences of a delict). Obviously, once the Court were endowed with compulsory jurisdiction on the basis of an instrument other than the convention on State responsibility, that requirement would become superfluous.

115. Coming now to question (iii) in paragraph 113 supra, it seems appropriate, in our view, that an ICJ finding of international crime be considered as fulfilling the condition for the ab omnibus tertiis implementation of the special consequences of crimes, whatever the source of the ICJ's competence to deal with the question of existence/attribution. All the Member States participating in the convention on State responsibility would thus be entitled to avail themselves of an ICJ judgement based on a jurisdictional link unrelated to the convention on State responsibility and deriving, e.g., from the Genocide, Torture or Racial Discrimination Convention. However, the extension to omnes tertios would of course only apply to the part of the ICJ judgement covering the existence/attribution of an international crime. It would not extend to any parts of that judgement concerning only the State or States having seized the Court on the strength of a jurisdictional link unrelated to the convention on State responsibility. Any part of the Court judgement relating either to the existence/attribution or the consequences of a possible mere delict or the consequences of the crime itself would not extend beyond the parties between which the proceedings were initiated. In other words, only the original applicant State or States, together with the defendant allegedly wrongdoing State or States, would be subject, in conformity with Article 59 of the Statute, to any parts of the ICJ's judgement other than the part relating to the existence/attribution of an international crime.

116. A problem could of course arise with regard to the position of "third" States in any ICJ proceedings initiated by one or more States on the strength of a jurisdictional link originating in an instrument other than the convention on State responsibility. Under that convention, as explained, any participating Member State of the United Nations would, following the adoption of the political body's resolution, be entitled to initiate proceedings before the Court and to participate therein. As "third" States vis-à-vis the case brought to the ICJ on the basis of a jurisdictional link deriving from a source other than the convention on State responsibility, those States would not be entitled in principle to participate in the Court proceedings. This situation should therefore be covered by some special rule in the draft. The most appropriate solution would be to provide that:

(i) in the hypothesis under consideration, any "third" State - namely any Member State of the United Nations participating in the convention on State responsibility other than the State or States

which seized the ICJ on the basis of a jurisdictional link unrelated to the said convention - shall be entitled to participate fully, by unilateral application, in the Court proceedings relating to existence or attribution of the crime, such States to participate as principals and not as intervening parties under Articles 62 and 63 of the ICJ Statute;

(ii) once the ICJ has ruled positively on the existence and attribution of a crime, the condition for the implementation of the special consequences of the crime shall be deemed to be fulfilled ipso facto for any Member State of the United Nations participating in the convention on State responsibility, notwithstanding the absence of a prior political pronouncement by the General Assembly or the Security Council.

(ii) The respective roles of General Assembly, Security Council, ICJ and omnes States

117. No difficulties would seem to arise from the fact that accusing States under paragraph 1 of draft article 19, as proposed, may seize either the General Assembly or the Security Council or both at the same time. As we see it, there would be here a case of concurrent competence between the two bodies. For the initiative of the accusing State to be successful, it would suffice that one or the other body reach an affirmative conclusion. Considering, anyway, that the resolution of the political body is only intended to open the way to a pronouncement by the ICJ (further to an application by one or more States), any divergence between the Assembly and the Council would be settled by the Court's decisive - positive or negative - judgment on existence and attribution.

118. A formula combining a resolution from a political body (General Assembly or Security Council), a judgment of the ICJ and the omnes injured States' implementation of the legal consequences of a crime is in our view the best - or the least unsatisfactory - that can be offered at the present stage of development of the so-called "organized international community", with a view to a civilized approach to the problem of the reaction to international crimes of States. The function of the political body is the closest possible approximation to a preliminary investigation of the degree of credibility of allegedly injured States' charges, failing which it would be improper to let the matter be brought to the judge. It is, in other words, the closest possible approximation - although a very remote one - to the prosecutorial function. 57/ In its turn, the ICJ's pronouncement following a

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57/ In the language of Alfred Zimmern, The League of Nations and the Rule of Law, 1918-1935, London, 1936, the political body's function - surely neither judicial nor conclusive - would be, according to draft article 19, to set up a "hue and cry". The resolution - not even a recommendation of that body - would merely identify a State as suspected of an alleged crime (as the old League Assembly was to do in the case of aggression), leaving it to all States to pursue the matter: the lawful follow-up - prior to any implementation of consequences - would be to bring the allegation before the ICJ for a decision on the existence of a crime.

full-fledged contentious procedure is the closest possible approximation to a proper and fair trial of the case in so far as the basic conditions of existence and attribution are concerned. That the subsequent, ultimate implementation of the articles on the legal consequences of the crime would have to remain in the hands of injured States - omnes States - is an inevitable consequence of the perjuring low degree of institutionalization of the inter-State system. This snag should not however be seen by the Commission as a reason not to pursue imaginatively the course of action it embarked upon in 1976, when it adopted article 19 of Part One.

119. Of course, the involvement of a hopefully large number of States in the reaction to a crime may be a source of differences, controversies and even dispute. Although such difficulties may also arise in the case of delicts (whenever the wrongful act consisted of a violation of an erga omnes obligation), they are likely to be more serious and frequent in the case of crimes. The only remedy we can think of at present is either reliance on the possibilities of coordination afforded by the Assembly, the Security Council or other international bodies exercising competence in the relevant area, or reliance on possible ad hoc arrangements among the omnes injured States, or any groups thereof. This difficult problem is tentatively covered by subparagraphs (c) to (g) of draft article 18 as contained in addendum 1 to the present document.

D. Concluding remarks

1. The proposed solution and objections to article 19 of Part One

120. The moment has now come for us to consider the proposed solution in the light of the objections which have been raised so far to the inclusion, in the draft on State responsibility, of the notion of international crimes of States.

121. Those objections are based on a number of interrelated and partially overlapping arguments. One set of arguments is that States are by nature susceptible neither of criminal liability nor of penal sanction, penal liability and sanction being appropriate only for individuals. This set of arguments is based upon the maxim societas delinquere non potest. 58/ Closely related is the argument that the inter-State system is endowed neither with a prosecutorial institution nor with a court of criminal law with compulsory jurisdiction for State crimes vis-à-vis any State.

122. To begin with the first set of arguments, we have discussed in the fifth report the weight of the maxim societas delinquere non potest as applied to States as participants in international relations and subjects of international law. 59/ In the first place, it is not quite correct to say that legal persons are not susceptible - mutatis mutandis - of more than merely civil liability and sanction. Secondly, States are not quite the same thing as juristic persons of national law, anyway. As international persons they look more like factual collective bodies than juristic persons; and they

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58/ Fifth report (A/CN.4/453/Add.3), para. 142 et seq.

59/ Ibid.

like to call themselves "powers": a term unknown to the law and practice of both private corporate bodies and public subdivisions of States, including member States of federal States. 60/ Thirdly, and most importantly, States frequently behave in such manner as to breach legal and moral obligations that are so essential for the peace, the survival and welfare of other States and peoples that their breach is considered universally as materially and morally far more serious than the gravest delinquencies committed by private individuals, groups or corporations.

123. As regards the argument that liability for exceptionally serious international breaches should be envisaged only for individuals, we appreciate, despite the serious reservations which have been recently raised by Governments over important elements of the draft Code of Crimes against the Peace and Security of Mankind, the role that such an instrument could play, if adopted, in curbing violations of fundamental international obligations. Apart from the fact, however, that the draft expressly provides that prosecution of an individual "does not relieve a State of any responsibility" (article 5), thus leaving open the question of the State's liability, 61/ the gravest among the individual crimes contemplated in the Code are envisaged as ascribable to individuals holding authoritative positions at the summit of a State or close thereto. 62/ It follows that, in the most important cases, criminal proceedings under the Code will heavily involve the State within whose establishment the accused individuals operated. Unless the State's establishment manages to disassociate itself convincingly from the accused parties, the individual crime will easily appear to be so closely connected with the reprehensible conduct of other organs that the individual crime will be recognized as a crime of State of the same or very similar denomination. Two factors may frequently concur in making such an outcome inevitable. One is that the infringed rule is basically identical in both cases, as is also the dimension of the wrongful act or acts, i.e. the actions or omissions constituting the "objective" or "external" element of the crime. The other factor relates to the so-called "internal" or "psychological" element, namely the wilful intent (dolus). 63/ Even assuming that the Code became soon a juridical reality despite the many hurdles that should be overcome for its ratification and implementation (with or without an

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60/ Ibid., para. 145.

61/ Para. (2) of the commentary to article 5 of the draft Code refers expressly to the commentary to article 19 of Part One of the draft on State responsibility, which excludes that the punishment of individuals who are organs of the State "exhaust the prosecution of the international responsibility incumbent upon the State ..." (Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (A/46/10), p. 255).

62/ See, for example, para. (4) of the commentary to article 14 of the draft Code.

63/ It is indeed hard to imagine how the combination of actions/omissions and intent would not coalesce, at one and the same time, into a wrongful act of the individual and of the State, and presumably a crime of both. Only exceptionally would the crime of an individual involve a mere delict on the part of the State.

international criminal court), the notion of the criminal responsibility of the individual at the international level does not significantly reduce the raison d'être of article 19 and the Part Two and Part Three provisions that are necessary for a proper implementation of that article.

124. Be it as it may of individual delicta juris gentium and the Code of Crimes Against the Peace and Security of Mankind, it must be acknowledged that breaches of the kind of obligations referred to in paragraph 3 of article 19 have now for some time attracted general condemnation on the part of the international community and international fora. Examples of wrongful acts so condemned have been given in paragraphs 78 to 84 supra. They indicate that all the wrongful acts in question are generally viewed as: (i) infringing erga omnes rules of international law, possibly of jus cogens; (ii) being injurious to all States; (iii) justifying a generalized demand for cessation/reparation; and (iv) eventually justifying a generalized reaction in one form or another on the part of States or international bodies. It would seem therefore highly appropriate that something be done by the ILC in order to bring such reaction under some measure of more specific legal control within the draft on State responsibility. 63 bis/

125. Article 19, as adopted on first reading in 1976, represented a preliminary step in that direction. A second step was article 5, as adopted on first reading, which entitles all States to demand cessation/reparation and eventually resort to countermeasures.

126. Draft articles 15 to 20, as they appear in addendum 1 to this document, lay down the rules which the Special Rapporteur deems indispensable in order to specify the conditions, modalities and limits of the said generalized reaction. Those articles are meant to provide the legal control of that reaction within the framework of the law of State responsibility to which the matter properly belongs. 64/

127. Coming now to the second set of objections, namely to the "institutional" problem, it is of course undeniable that the inter-State system - or, for that matter, the rather undefined or ill-defined "international community" (of men, of nations, of peoples or of States) - is not endowed, and is not likely to be endowed soon, with such institutions as a procuracy and a court of criminal jurisdiction (not to mention an effective enforcement machinery). It is however simplistic to argue on that basis against the singling out of some internationally wrongful acts as calling for a more severe legal condemnation. The inter-State system is indeed still a

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63 bis/ We call again the reader's attention to M. Spinedi's valuable writings on the subject. We refer particularly to her comprehensive introductory study in the Florence symposium volume cited in footnote 24 supra; and her "Contribution à l'étude de la distinction entre crimes et délits internationaux", in La Comunitá internazionale, Quarderni No. 2, 1984.

64/ Paras. 136-138 infra.

very inorganic one. But isn't this argument applicable to all areas of international relations and international law? 65/

128. The inter-State system is not less inorganic - to remain in the area of State responsibility - with regard to the consequences of delicts. The whole process, starting with the decision as to the existence and attribution of a delict and continuing with demands of cessation and reparation and eventual resort to countermeasures, is in principle - namely, under general international law - in the hands of States. The only exceptions derive from the regretfully infrequent and mainly bilateral conventional arrangements for "third party" settlement procedures. A few more exceptions would result from the provisions proposed by us in our fifth report 66/ - for the articles of Part Three of the draft and currently pending before the Drafting Committee and from our draft article 12 of Part Two.

129. Moving to an even more crucial chapter of international law, the institutional gap is even more evident - and dramatic - in the area of the maintenance of international peace and security. Despite the remarkable innovations embodied in Chapter VII of the Charter, the international community appears not to be so "organized" in this area after all. The Security Council has not succeeded so far in having placed directly at its disposal the armed forces indispensable for a really effective action of its own. Although security measures are recommended or decided upon by the Council - a restricted body which can hardly be considered to represent the entire international community - they are carried out by States, and, at that, by some States only. To recognize this reality as reflective of the balance of power in the inter-State system is one thing; to speak of an "organization" of collective security is quite another. For good or evil, the maintenance of international peace and security is in the hands of the major Powers just as it was a century ago: but this would not be a good reason, surely, to do away with collective security as administered through the only available body, however imperfect.

130. A different situation exists of course in some special areas such as the protection of human rights. However, the most effective international institutions in the area of human rights do not really operate at the level of inter-State relations. They operate rather, so to speak, at an infra-State level as common organs of the States participating in each human rights system. Inter-State relations in a proper sense remain, even in this area, essentially inorganic.

131. It follows, in our view, that the inter-State system or the "international community" does not seem to be any less "organized", in the area of the legal control or coordination of reactions to crimes of States than in other areas. In this area as in any other areas, States are still the main actors. It is for States to accuse and it is for States to demand cessation/reparation from a wrongdoing State and to resort eventually to countermeasures. So far, nothing different from the successive phases in the

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65/ See footnote 23 supra.

66/ A/CN.4/453 and Add.1.

handling of a delict, i.e. determination of existence and attribution, demand of cessation/reparation and eventual countermeasures.

132. If the greater severity of the legal consequences of crimes calls for some measure of institutional control, it does not necessarily follow that that control should be so broad and intrusive as to abolish the role of States. Existing institutions offer neither a procuracy nor a Court of full criminal jurisdiction, nor an organized enforcement mechanism. They offer nevertheless good possibilities of reducing the arbitrariness of the omnes injured States' unilateral or collective reactions. The procedure described in the preceding paragraphs and envisaged in draft article 19, as set forth in addendum 1, is intended precisely to perform that function.

133. The Special Rapporteur deems it indispensable to stress, at this point, two essential features of the solution proposed in the present document and its addendum 1.

2. The proposed solution and the main existing instruments on international organization

134. One essential feature is that the proposed two-phased procedure does not involve any modification of the two main existing instruments of international organization. I refer to the United Nations Charter and the Statute of the ICJ. By envisaging a General Assembly or Security Council resolution as a precondition of the ICJ's jurisdiction under Article 36 of the ICJ Statute, the future convention on State responsibility would affect neither the United Nations Charter nor the ICJ Statute.

135. As regards the Charter, it would not be the first time that an international treaty other than the Charter itself requires specific action on the part of the General Assembly or the Security Council for the treaty to produce given effects of its own. Familiar examples are, for the Assembly, article 8 of the Genocide Convention and articles 6 and 8 of the Apartheid Convention. Examples for the Security Council are the roles attributed to that body as illustrated in a well-known article. 67/ It follows that the proposed solution does not imply any institutional modification in the existing structure of the so-called "organized international community". A future convention on State responsibility would merely put to use, on its own juridical strength, the existing political and judicial organs of the United Nations.

3. The international law of State responsibility and the United Nations collective security system

136. The second essential feature concerns the relationship of the proposed solution with the collective security system embodied in the United Nations Charter. Two distinct systems would coexist. On the one hand there would be the political role performed under the Charter by the Security Council and the General Assembly - but mainly by the former - with regard to the maintenance of international peace and security. On the other hand, there would be the

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67/ K. Herndl, "The 'Forgotten' Competences of the Security Council" in Festschrift für Rudolf Kirchschläger, Wien, 1990, pp. 83-91.

role entrusted by the convention under elaboration to either political body - and to the ICJ - in the area of State responsibility. In the area of collective security - namely the reaction to any violations of Article 2, paragraph 4, of the Charter - there are the purely political functions performed respectively by the Security Council and the General Assembly: functions that in principle are not meant to interfere with the law of State responsibility and its application. In the area of State responsibility for international crimes, one would find, on the strength of the convention on State responsibility, the preliminary political evaluation by the Assembly or the Council of the seriousness of the accusing State's or States' allegation, such evaluation eventually to be followed by the decisive pronouncement of the ICJ as the condition required by the convention for the implementation by omnes States of the consequences of an international crime. 68/

137. The Charter system of collective security and the international responsibility system of the future convention would thus operate independently in conformity with their respective, essential features. In the area of security, where discretionary power and urgency of action are of the essence, the decision would ultimately rest solely with the Security Council in its restricted membership. But in the area of State responsibility for very serious breaches of fundamental international obligations, where the judicial application of the law is instead of the essence, the decision, prior to that of the omnes States themselves, must rest ultimately with the Court. As regards the preliminary role of either political body, absolute impartiality is obviously unattainable. A relatively high degree of impartiality can however be expected from the Assembly due to the two-third majority requirement and from the Council due to the mandatory abstention of the parties in the dispute. The area pertains to Chapter VI and not Chapter VII of the Charter. 69/ It could thus be hoped that, at least for the purposes of State responsibility for international crimes, no States, in either body - as before the Court - would be more equal than others.

138. We trust that the above considerations should reduce the objections to the notion of State crimes based upon the lack of a prosecutorial institution and a criminal court. Those objections appear to beg the question. The question is whether States will be willing to accept article 19 and its minimal implications set forth in the present report. As in other areas of progressive development and codification of international law, it is for the Commission to take the initial technical step. We hope it will be an imaginative step.

68/ The importance of the role of the ICJ with regard to the crime of genocide is stressed, for example, by the United Kingdom Government in its recent comments as reproduced in Mr. Thiam's thirteenth report (A/CN.4/466), para. 60.

69/ References in footnote 48 supra.